

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1913~~ 1914

No. ~~999~~ 98

THE JOHN II ESTATE, LIMITED, PLAINTIFF IN ERROR,

VS.

GEORGE II BROWN AND FRANCIS HYDE II BROWN, A
MINOR, AND A. A. WILDER, AS GUARDIAN *AD LITEM*
OF FRANCIS HYDE II BROWN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

FILED JANUARY 15, 1913.

(23,504)

(23,504)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 929.

THE JOHN II ESTATE, LIMITED, PLAINTIFF IN ERROR,

vs.

GEORGE II BROWN AND FRANCIS HYDE II BROWN, A
MINOR, AND A. A. WILDER, A GUARDIAN *AD LITEM*
OF FRANCIS HYDE II BROWN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 1996

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

THE JOHN II ESTATE, LIMITED, an Hawaiian Corporation, and CHARLES A. BROWN and JOHN A. MAGOON, Directors of the JOHN II ESTATE, LIMITED,

Plaintiffs in Error,

vs.

GEORGE II BROWN and FRANCIS HYDE II BROWN, a Minor, and A. A. WILDER, as Guardian Ad Litem of FRANCIS HYDE II BROWN,

Defendants in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the Territory of Hawaii.

Names and Addresses of Attorneys for Parties in Cause.

For John H Estate, Limited, an Hawaiian Corporation, and Charles A. Brown and John A. Magoon, Directors of the John H Estate, Limited, Plaintiffs in Error:

MAGOON & WEAVER, Honolulu, Hawaii.

For Francis Hyde H Brown, a Minor, and A. A. Wilder, as Guardian of Francis Hyde Brown, and George H Brown, Defendants in Error:

THOMPSON & WILDER, Honolulu, Hawaii.

In the District Court of the United States in and for the District and Territory of Hawaii.

JOHN H ESTATE, LIMITED, an Hawaiian Corporation, and CHARLES A. BROWN and JOHN A. MAGOON, Directors of the JOHN H ESTATE, LIMITED,

Defendants—Plaintiffs in Error,

vs.

FRANCIS HYDE H BROWN, a Minor, and A. A. WILDER, as Guardian of FRANCIS HYDE H BROWN, and GEORGE H BROWN,
Defendants—Defendants in Error.

Order Extending Time for Filing Record.

The United States of America,—ss.

For satisfactory reasons appearing to the Court, the time for filing the Transcript of Record in the above-entitled cause in the Circuit Court of Appeals

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pursuant to the Writ of Error sued out, is extended sixty days from April 21, 1911; that is, up to and including June 20, 1911.

S. B. DOLE,

Judge of the United States District Court in and for the District and Territory of Hawaii.

[Endorsed]: No. 47. (Title of Court and Cause.) Order Extending Time for Filing Record. Filed March 28th, 1911. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [1*]

In the United States District Court for the Territory of Hawaii.

THE UNITED STATES OF AMERICA,

Plaintiff and Petitioner,

vs.

JOHN II ESTATE, LIMITED, an Hawaiian Corporation; CARL S. HOLLOWAY; IRENE II HOLLOWAY; FRANCIS II HYDE BROWN; GEORGE II BROWN; IRENE II HOLLOWAY, as Guardian of the Persons and Estates of FRANCIS II HYDE BROWN and GEORGE II BROWN, and CHARLES A. BROWN, JOHN A. MAGOON, ALFRED W. CARTER, SIDNEY M. BALLOU and IRENE II HOLLOWAY, Directors of the JOHN II ESTATE, LIMITED,

Defendants and Respondents.

* Page number appearing at foot of page of original certified Record

Statement.

Time of Commencing Suit:

February 10, 1906, Verified Petition for Condemnation filed and Summons issued on February 15, 1906, to the United States Marshal for the District of Hawaii.

Names of Original Parties:

Plaintiff and Petitioner: The United States of America.

Defendants and Respondents: John H Estate, Limited, an Hawaiian Corporation; Carl S. Holloway; Irene H Holloway; Francis H Hyde Brown; George H Brown; Irene H Holloway, as Guardian of the Persons and Estates of Francis H Hyde Brown and George H Brown; and Charles A. Brown, John A. Magoon, Alfred W. Carter, Sidney M. Ballou and Irene H Holloway, Directors of the John H Estate, Limited.

[2]

Dates of Filing of Pleadings:

February	10, 1906.	Petition for Condemnation.
March	20, 1906.	Answer of A. G. M. Robertson, Guardian <i>ad Litem</i> .
March	24, 1906.	Answer of John H Estate, Limited, Chas. A. Brown and J. Alfred Magoon, Directors of John H Estate.
September	10, 1906.	Stipulation Waiving Jury Trial.
August	24, 1909.	Judgment and Decree.

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September	21, 1909.	Notice to Parties in Interest.
October	6, 1909.	Statement of Claim of John Ii Estate, Limited.
October	11, 1909.	Statement of Claim by Francis Hyde Ii Brown, a Minor.
October	11, 1909.	Statement of Claim by George Ii Brown.
January	31, 1910.	Stipulation Substituting Guardian <i>ad Litem</i> for Francis Ii Hyde Brown.
January	31, 1910.	Order Appointing A. A. Wilder, Guardian <i>ad Litem</i> for Francis Ii Hyde Brown.
January	31, 1910.	Withdrawal of A. G. M. Robertson as Guardian <i>ad Litem</i> for Francis Ii Hyde Brown.
March	17, 1911.	Notice of Presentation of Bill of Exceptions and Admission of Service.
March	17, 1911.	Bill of Exceptions of John Ii Estate, Limited.
March	20, 1911.	Notice of Intention to Apply for Writ of Error.
March	20, 1911.	Petition for Writ of Error.
March	20, 1911.	Assignment of Errors.
March	20, 1911.	Writ of Error.
March	20, 1911.	Order Allowing Writ of Error.

March	24, 1911.	Citation.
March	24, 1911.	Bond on Writ of Error.
March	28, 1911.	Order Extending Time to File Record on Appeal.
April	3, 1911.	Præcipe for Record on Ap- peal.

Service of Process:

February 15, 1906. Summons was issued and certified copies thereof were delivered to the United States Marshal for the [3] District of Hawaii. Said Summons was thereafter returned into court with the following return by the said Marshal:

"I HEREBY CERTIFY, That I received the within writ on the 15th day of February, A. D. 1906, and personally served the same on the 15th day of February, A. D. 1906, upon Sidney M. Ballou, Director of the John Ii Estate, Limited, and personally served the same on the 16th day of February, A. D. 1906, upon Carl S. Holloway; Irene Ii Holloway; Francis Ii Hyde Brown; George Ii Brown; and Irene Ii Holloway, as Guardian of the Persons and Estates of Francis Ii Hyde Brown and George Ii Brown; and Irene Ii Holloway, Director of the John Ii Estate, Limited; and personally served the same on the 17th day of February, A. D. 1906, upon Charles A. Brown, as Manager of the John Ii Estate, Limited; Charles A. Brown; John A. Magoon; Alfred W. Carter, Directors of the John Ii Estate, Limited, by delivering to, and leaving with each of the said defendants

named therein personally, at their residences and places of business in Honolulu, a certified copy thereof, together with a copy of the Petition certified to by F. L. Hatch, Deputy Clerk of the United States District Court, attached thereto.

(Sgd.)

E. R. HENDRY,
U. S. Marshal."

Honolulu, February 17th, 1906.

Time When Trial Was Had:

Trial by jury hereof having been waived, the within cause was submitted on briefs and decision rendered by the Hon. Sanford B. Dole on the 24th day of August, A. D. 1909. [4]

**Certificate of Clerk U. S. District Court to
Statement.**

United States of America,
Territory of Hawaii,—ss.

I, A. E. Murphy, Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled suit; the names of the original parties thereto and those who have become parties, before the appeal; the several dates when the respective pleadings were filed; an account of the proceedings showing the service of the summons and the time when the Judgment herein was rendered and the Judge rendered the same, in the case of the United States of America vs. John Ii Estate, Limited, and

Hawaiian Corporation; Carl S. Holloway; Irene Ii Holloway; Francis Ii Hyde Brown; George Ii Brown; Irene Ii Holloway, as Guardian of the Persons and Estates of Francis Ii Hyde Brown and George Ii Brown; and Charles A. Brown, John A. Magoon, Alfred W. Carter, Sidney M. Ballou and Irene Ii Holloway, Directors of the John Ii Estate, Limited, Number 47, in the United States District Court for the Territory of Hawaii.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 23d day of May, A. D. 1911.

[Seal]

A. E. MURPHY,

Clerk United States District Court, Territory of Hawaii. [5]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

THE UNITED STATES OF AMERICA,

Plaintiff and Petitioner,

vs.

JOHN Ii ESTATE, LIMITED, an Hawaiian Corporation; CARL S. HOLLOWAY; IRENE Ii HOLLOWAY; FRANCIS Ii HYDE BROWN; GEORGE Ii BROWN; IRENE Ii HOLLOWAY, as Guardian of the Persons and Estates of FRANCIS Ii HYDE BROWN and GEORGE Ii BROWN; and CHARLES A. BROWN, JOHN A. MAGOON, ALFRED W. CARTER, SIDNEY

8 *The John Ii Estate, Limited, et al.*

M. BALLOU and IRENE H HOLLOWAY,
Directors of the JOHN H ESTATE, LIM-
ITED,

Defendants and Respondents.

Petition of the United States of America.

To the Honorable the District Court of the United
States of America in and for the Territory and
District of Hawaii:

Now comes your petitioner, The United States of
America, named hereinabove as plaintiff and peti-
tioner, and represents, avers, alleges and shows as
follows, to wit:

I.

That, according to law, your petitioner was and
still is invested with the power, right and capacity
to purchase, acquire, condemn and hold all such real
estate wherever situate within its jurisdiction, as
may be, for any purpose, necessary to the due exer-
cise of its powers and duties; and in pursuance of
and to said power, right and capacity, said plaintiff
and petitioner has been and is now desirous of pur-
chasing, acquiring, condemning and holding that
certain tract and parcel of land, and its appurte-
nances, situate within the limits of the aforesaid
Territory and District, and hereinafter more partic-
ularly described, for the erection and maintenance
thereon of a naval station and harbor and channel
defense, a public use to and for which said tract and
parcel [6] of land is necessary and indispensable.

II.

That the aforesaid tract and parcel of land and its

appurtenances, so to be purchased, acquired, condemned and held for the purposes aforesaid, is situated in the District of Ewa, in the Harbor of Pearl Lochs, sometimes called Pearl Harbor, in the Island of Oahu, in the Territory and District of Hawaii, in the United States of America, and is bounded and particularly described as follows, to wit:

Commencing at an initial point determined as follows:

From the "Pillar of Stone" at Kaheeka Point, Pearl Harbor, which marks the boundary between Puuloa and Honouliuli, from which point the Government Trig. Station at Salt Lake bears by true azimuth $258^{\circ} 40' 35''$ 25,710 feet, run $305^{\circ} 43' 30''$ 2,930 feet to said initial point; said initial point is marked by a steel drill driven into a drill hole in the solid coral rock 12 feet from the edge of the sea bluff, and about 210 feet northwest of the southwest end of an old stone-wall across the WAIPIO Peninsula; from this initial point running by true azimuth $242^{\circ} 46'$ 1,288 feet across the Peninsula along the remainder of L. C. Award 8,241 to John Ii, to a steel drill in a drill hole in the coral rock $5\frac{1}{2}$ feet from the edge of the sea bluff; from which said last point the Government Trig. Station at Salt Lake bears by true azimuth $254^{\circ} 7' 6''$ 22,546 feet; thence the boundary follows the windings of the seacoast at high-water mark around that portion of the peninsular to the southeast of the line as above described to the initial point; containing an area of fifty (50) acres.

And in this behalf this plaintiff and petitioner further avers and shows to said Court that attached

to and made a part of this petition, and accompanying this petition, is a map which correctly delineates the aforesaid tract and parcel of land sought to be condemned herein, and its location; and this plaintiff and petitioner now refers to said map so attached as aforesaid to this petition, and incorporates [7] said map and makes it a part of, the description of the aforesaid tract and parcel of land hereinabove referred to; and this plaintiff and petitioner further shows that said map just referred to is marked herein as Exhibit "A."

III.

This plaintiff and petitioner further alleges and shows that the aforesaid tract and parcel of land hereinabove in paragraph two of this petition described includes and constitutes the whole of an entire tract and parcel.

IV.

Under and pursuant to the power, right and capacity in it vested by law, it is the intention, will, purpose and desire of your petitioner to acquire a fee simple estate in and to the aforesaid tract and parcel of land, and its said appurtenances, for all the purposes in this petition mentioned; and in this behalf your petitioner demands and prays the acquirement of a fee simple estate for all the purposes in this petition mentioned, in and to the aforesaid tract and parcel of land, and its said appurtenances, sought herein to be purchased, acquired, condemned and held by your petitioner for the purposes in this petition mentioned.

V.

That the purposes for which your petitioner has been and is now desirous of purchasing, acquiring, condemning and holding the aforesaid tract and parcel of land and its said appurtenances, constitute and are a public use; that the use to which the aforesaid tract and parcel of land and its said appurtenances are herein sought to be purchased, acquired, condemned and held by your petitioner, and to which said tract and parcel of land, and its said appurtenances, are to be put, is the following public use, to wit, the erection and maintenance thereon of a naval station and harbor and channel defense, for the uses and purposes of the Government of the United States of America, and [8] of the War and Navy Departments of said Government, and for the improvement of the harbor and channel leading into Pearl Lochs, sometimes called Pearl Harbor, by removing obstructions therefrom, and widening, deepening and straightening said channel, together with the erection and maintenance upon said tract and parcel of land, and its said appurtenances, of all such public buildings, fortifications, magazines, arsenals, navy-yards, lighthouses, range and beacon lights, quarantine stations, pesthouses, hospitals, wharves, docks, piers, dams, bridges, cemeteries, reservoirs, roads, canals, ditches, flumes, aqueducts, pipe-lines, and sewers, as may be proper or necessary to or for the efficient maintenance of said naval station and harbor and channel defense, and to and for the uses and purposes therein of said Government and of its said War and Navy Departments, and that the fore-

going public use is the public use for which the aforesaid tract and parcel of land, and its said appurtenances, are required by your petitioner, the United States of America.

VI.

Your petitioner further shows that the necessity for the acquisition, purchase, acquirement, condemnation and holding, in and by a fee simple estate, of the aforesaid tract and parcel of land and its said appurtenances, by your petitioner, for the aforesaid public use is and arises from various Acts of the Congress of the United States of America; and also from the present rapid development of the commerce of the Pacific Ocean and the singular location of said Pearl Lochs, sometimes called Pearl Harbor, with reference to said commerce, relative to its value as a place of refuge, repair, instructions to masters, protections to shipping, refuge for merchant vessels in time of war, land-locked deep water anchorage, capacity for successful defense from outside attacks, and capabilities as the only defensible harbor within the said Territory and District of Hawaii; and also from the imperative need in a naval station of dry-docks, work and repair shops, coaling station of large capacity, with sheds, coal-pockets, [9] chutes and sheltered anchorages and berthing space for tugs, lighters, barges, coal hulks, etc., extensive grounds for marine barracks, parade grounds, and a still larger area for drilling large bodies of soldiers, sailors and marines, ample camping grounds for any military or naval force that would be rendezvoused in time of war, hospital ac-

commodations with surrounding grounds, cemetery facilities, ample and suitable space for magazine purposes, and for such other purposes and needs as are or may be proper or incidental to the maintenance of such naval station and harbor and channel defense, all of which must be capable of expansion as the future military and naval needs of the Government of the United States of America may demand; and also from the judgment and decision of the Honorable, the Secretary of the Navy of the United States of America, deciding that the aforesaid tract and parcel of land and its said appurtenances, constitutes the most fit, proper, adequate and suitable tract and parcel of land whereon to establish and maintain the aforesaid naval station and its appurtenances; and in this behalf this petitioner alleges and shows that the taking by the United States of America of the aforesaid tract and parcel of land, with its said appurtenances, is necessary to the aforesaid public use; and petitioner further shows that the necessity of and for said taking for said public use is hereinabove fully set forth and alleged.

VII.

Your petitioner further alleges and shows that the following named estate and persons are the owners of, or claim some interest in, the aforesaid tract and parcel of land, hereinabove described, and its said appurtenances, sought to be condemned herein, to wit: John Ii Estate, Limited, an Hawaiian Corporation; Carl S. Holloway; Irene Ii Holloway; Francis Ii Hyde Brown; George Ii Brown; Irene Ii Holloway, as Guardian of the Persons and Es-

tates of Francis Ii Hyde Brown and George Ii Brown; and Charles A. Brown, John A. Magoon, Alfred W. Carter, Sidney M. Ballou and Irene Ii Holloway, Directors of the John Ii Estate, Limited.
[10]

That the said named defendants and respondents Francis Ii Hyde Brown and George Ii Brown are minors, and the said Irene Ii Holloway is the duly and regularly appointed, qualified and acting Guardian of the persons and estates of said minors; that the said Charles A. Brown, John A. Magoon, Alfred W. Carter, Sidney M. Ballou and Irene Ii Holloway are the duly and regularly elected, qualified and acting directors of the John Ii Estate, Limited.

VIII.

That the value of the aforesaid tract and parcel of land and its said appurtenances, sought to be condemned and acquired herein by your petitioner, is the sum of five thousand dollars, in lawful money of the United States of America.

IX.

That it is the intention of your petitioner in good faith to complete the work and improvements for which as herein alleged the said tract and parcel of land, with its said appurtenances, are herein sought to be acquired and condemned.

X.

That all the preliminary steps required by law have been taken and exist, to entitle your petitioner to institute these proceedings.

WHEREFORE, your petitioner prays as follows, to wit:

First. That the Court may by order appoint some suitable person as guardian *ad litem* of the said minor children, to wit: Francis Ii Hyde Brown and George Ii Brown, to make defense in this proceeding.

Second. That it may be adjudged that the public use hereinabove alleged requires the acquisition by condemnation to your petitioner of the aforesaid tract and parcel of land, together with its appurtenances, and that your said petitioner be adjudged and entitled to take and hold and acquire said tract and parcel of land, and its said appurtenances, in fee simple absolute, for the public uses and [11] purposes hereinabove specified, upon making compensation therefor, and that said Court determine all claims and all adverse or conflicting claims to the said tract and parcel of land, and its appurtenances, sought to be condemned herein, and to the compensation or damages, if any, to be awarded for the taking of the same, and that your petitioner have all its proper and necessary costs and disbursements herein; and that your petitioner have such other and further relief herein as may be proper.

THE UNITED STATES OF AMERICA,

By (Sgd.) ROBT. W. BRECKONS,

United States Attorney.

The United States of America,
District of Hawaii,—ss.

Robert W. Breckons, being first duly sworn, according to law, deposes and says that he is the United States District Attorney in and for the Territory and District of Hawaii; that he has been duly

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and regularly authorized to bring this action by the Attorney General of the United States of America; that he has read the foregoing petition, and knows the contents thereof, and that the facts therein stated he believes to be true.

(Sgd.) ROBERT W. BRECKONS.

Subscribed and sworn to before me this 10th day of February, A. D. 1906.

[Seal]

(Sgd.) W. B. MALING,
Clerk of said Court. [12]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

THE UNITED STATES OF AMERICA,

Plaintiff and Petitioner,

vs.

JOHN II ESTATE, LIMITED, an Hawaiian Corporation; CARL S. HOLLOWAY; IRENE II HOLLOWAY; FRANCIS II HYDE BROWN; GEORGE II BROWN; IRENE II HOLLOWAY, as Guardian of the Persons and Estates of FRANCIS II HYDE BROWN and GEORGE II BROWN; and CHARLES A. BROWN, JOHN A. MAGOON, ALFRED W. CARTER, SIDNEY M. BALLOU, and IRENE II HOLLOWAY, Directors of the JOHN II ESTATE, LIMITED,

Defendants and Respondents.

**Answer of Francis Hyde Ii Brown, a Minor, and
George Ii Brown, a Minor, by A. G. M. Robertson,
Esq., Their Guardian Ad Litem.**

To the Honorable the District Court of the United States of America in and for the District and Territory of Hawaii:

The joint answer of Francis Hyde Ii Brown, a minor, and George Ii Brown, a minor, two of the defendants above named, to the petition of the United States of America, plaintiff herein, respectfully alleges and shows as follows:

That in and by an order duly made and entered

herein on the 5th day of March, 1906, A. G. M. Robertson, Esq., was regularly appointed the guardian ad litem of and for these defendants and is now acting as such guardian.

That these defendants admit that the plaintiff herein was and still is invested with the power, right and capacity to purchase, acquire, condemn and hold all such real estate wherever situate within its jurisdiction, as may be, for any purpose, necessary to the due exercise of its powers and duties as alleged in paragraph 1 of said petition.

That these defendants have not sufficient knowledge or [14] information to form a belief as to the truth of the remaining allegations contained in said first paragraph, and so neither admit nor deny the same, but leave the plaintiff to its proof thereof.

That these defendants have not sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraphs 2, 4, 5, 6, 9 and 10 of said petition, and therefore neither admit nor deny the same, but leave the plaintiff to its proof thereof.

That these defendants deny the allegation contained in paragraph 3 of said petition, and aver that the parcel of land described in said petition is part of a larger tract, the remaining portion of which will be diminished in value by reason of its severance from the part sought to be condemned.

That these defendants deny that the value of the tract of land described in said petition, with its appurtenances is of the value of only five thousand dollars, and allege they are informed and believe,

and so allege upon such information and belief, that the same is of the value of twenty-five thousand dollars.

That these defendants admit the allegations contained in paragraph 7 of said petition to be true, and they allege that their claims in and to said parcel of land are adverse to and in conflict with the claims of the other defendants herein, and that it will be necessary for this Court, in the event of the prayer of said petition being granted, to decide said respective claims and to apportion the money that may be adjudged to be paid by said petitioner for said land.

WHEREFORE, these defendants pray that in the event of said condemnation being adjudged, and upon the value of said premises being determined, the sum representing such value shall be directed to be paid into the registry of this Court, [15] and that the apportionment thereof among said defendants may be determined upon such further pleadings and proceedings as this Court may allow or direct.

Dated Honolulu, March 20th, 1906.

FRANCIS HYDE II BROWN, a Minor,

GEORGE II BROWN, a Minor,

By (Sgd.) A. G. M. ROBERTSON,

Their Guardian ad Litem.

(Sgd.) A. G. M. ROBERTSON,

Attorney for said Minors.

Territory of Hawaii,

County of Oahu,—ss.

A. G. M. Robertson, being duly sworn, on oath de-

poses and says that he is the guardian ad litem named in the foregoing answer; that he has read the same; knows its contents; and that the matters therein set forth are true, except those alleged upon information and belief, and those he believes to be true.

(Sgd.) A. G. M. ROBERTSON.

Subscribed and sworn to before me this 20th day of March, A. D. 1906.

[Seal] (Sgd.) F. L. HATCH,
Deputy Clerk of said Court. [16]

[Endorsed]: No. 47. (Title of Court and Cause.)
Answer of Francis Hyde Ii Brown, and George Ii Brown, minors, by their Guardian ad litem. Filed Mch. 20, 1906. W. B. Maling, Clerk. By (Sgd.) F. L. Hatch, Deputy Clerk. A. G. M. Robertson, Atty. for Minors. [17]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

THE UNITED STATES OF AMERICA,
Plaintiff and Petitioner,
vs.

JOHN II ESTATE, LIMITED, an Hawaiian Corporation et al.,
Defendants and Respondents.

Answer of John Ii Estate, Limited, and Charles A. Brown and J. Alfred Magoon, Directors, etc.

Now come the John Ii Estate, Limited, an Hawaiian Corporation and Charles A. Brown, and

J. Alfred Magoon, directors of said corporation, defendants and respondents and for answer to plaintiff's petition filed herein say:

FIRST: Answering paragraph one of said petition, these defendants admit that petitioner is vested with the powers set forth in said paragraph, but having no information or *acknowledge* of the other allegations set forth in said paragraph except as therein contained, neither admit nor deny the same, but leave petitioner to its proofs therein.

SECOND: These defendants admit the allegations in paragraph two of said petition, as to the location, discription and area of the land sought to be condemned; and further admit the accuracy of the map attached to said petition and marked Exhibit "A."

THIRD: Answering paragraph three of said petition, these defendants deny the allegations therein, and say that the tract and parcel of land described in paragraph two of said petition is a part of a large tract of land commonly known as the "Waipio Peninsula."

FOURTH: Answering paragraph four of said petition, these defendants not having information or knowledge thereof, except as in said paragraph contained, neither admit nor deny that petitioner has the intention, will, purpose and desire to acquire a fee simple estate or any estate in the land [18] described in said petition, but leave petitioner to its proofs therein.

FIFTH: Answering paragraph five of said petition, these defendants admit that the purposes for

which it is alleged said land is sought to be condemned are public uses, but not having information or knowledge thereof, except as in said petition contained, neither admit nor deny that the uses and purposes for which it is alleged said land is sought to be condemned are in fact the uses and purposes to which said land is sought to be put, if acquired by petitioner.

SIXTH: Answering paragraph six of said petition, these defendants admit that the land described in said petition would be useful for many, if not all, the purposes set forth in said paragraph, but as to the necessity for condemning said land for the uses and purposes set forth in said paragraph these defendants have no information or knowledge except as in said petition contained and leave petitioner to its proofs therein.

SEVENTH: These defendants admit the allegation contained in paragraph seven of said petition except in so far as they refer to Sidney M. Ballou, and deny that Sidney M. Ballou is a director of the said John Ii Estate, Limited, or is in any manner interested in said corporation or in said land; and these defendants allege that said John Ii Estate, Limited, is the sole owner in fee simple of said land.

EIGHTH: Answering paragraph eight of said petition, these defendants deny that the value of the tract and parcel of land and its appurtenances sought to be condemned and acquired by petitioner is Five Thousand Dollars, and these defendants say that the value of said land is Twenty-five Thousand Dollars and upward.

And further answering said paragraph, these defendants show that the said land is surrounded on three sides by the waters of said Pearl Lochs, sometimes called Pearl Harbor; that said land has an extensive frontage on said waters; that the depth of water immediately adjacent to said frontage varies from one foot to seventeen feet, the greater portion of said frontage having a depth of about fifteen feet; that said three sides of said land are within a few feet of water having a depth of from twenty-six to sixty-six feet; and that the extent of said deep water between [19] said land and the opposite shores is sufficient to allow vessels of the largest size to anchor, swing and turn. That the said land has a peculiar and important position in said Pearl Lochs sometimes known as Pearl Harbor, that is to say, the southern and northeastern boundaries of said land face upon and are adjacent to the main channel of said lochs, and the southwestern boundary of said land faces upon and is adjacent to the portion of said lochs known as the "West Loch." That said land varies in elevation above high-water mark from six to fifteen feet. That said land and the water adjacent thereto is so situate in said Pearl Lochs, sometimes called Pearl Harbor, as to be sheltered from storms and from high winds blowing from any direction. That by reason of the location of said land and its proximity to deep water, said land is very valuable for purposes of wharves, landings, piers, docks, warehouses, store, residences and other purposes; and these defendants believe that if given time to sell said land to private

parties for any or all of the purposes aforesaid, they could easily secure purchasers for said land at prices varying from \$500 to \$1,000 per acre.

And these defendants further show that said John Ii Estate, Limited, is the owner in fee simple of the whole of said Waipio Peninsula; that a large part of said peninsula has been leased to the Oahu Sugar Company, Limited, but said John Ii Estate, Limited, has reserved from the operation of said lease a strip of land 500 feet wide following the entire shore line of the said peninsula; that the object of the reservation as aforesaid was and is to offer for sale to private parties portions of said shore property to be used by them for purposes of residences and such other purposes as the same is adapted for; that a survey of said strip has been made and the land platted into blocks and lots, and the said John Ii Estate, Limited, is only awaiting an opportune time to place the same upon the market; that in case the land sought to be condemned in this action shall be condemned and petitioner shall use said property for the purposes named in said petition, the value of said reserved land will, as these defendants believe, greatly decrease and said John Ii Estate, Limited, will suffer great loss and damage, the exact amount of which cannot now with certainty be ascertained, but which will in all probability not be less than Ten Thousand Dollars. [20]

NINTH: As to the allegations contained in paragraphs nine and ten of said petition, these defendants not having information or knowledge thereof, except as in said petition contained, neither admit

nor deny the same but leave petitioner to its proofs therein.

Dated Honolulu, March —, 1906.

JOHN II ESTATE, LIMITED.

By (Sgd.) CHAS. A. BROWN,

Its Treasurer and Manager.

(Sgd.) CHAS. A. BROWN,

Director, John Ii Estate, Ltd.

(Sgd.) J. ALFRED MAGOON,

Director, John Ii Estate, Ltd.

City of Honolulu,

County of Oahu,

Territory of Hawaii,—ss.

Now come Charles A. Brown and J. Alfred Magoon, and being severally first duly sworn on oath, depose and say that they are directors of the John Ii Estate, Limited, an Hawaiian Corporation, and defendants and respondents above named; that they have read the foregoing joint and several answer, and know the contents thereof, and that the same is true. And the said Charles A. Brown further says that he is treasurer and manager of said corporation and verifies the foregoing answer for and on behalf of said corporation, and that the seal hereto attached is the common seal of said corporation.

(Sgd.) CHAS. A. BROWN.

(Sgd.) J. ALFRED MAGOON.

Subscribed and sworn to before me this 24th day of March, 1906.

[Seal]

(Sgd.) F. W. WUNDENBERG,

Notary Public Dist. of Honolulu.

[Endorsed]: No. 47. (Title of Court and Cause.)
Answer of John Ii Estate, Ltd. and Chas. A. Brown
and J. Alfred Magoon, Directors, etc. Filed Mch.
24, 1906. W. B. Maling, Clerk. By (Sgd.) F. L.
Hatch, Deputy Clerk. [21]

*In the District Court of the United States Within
and for the District of Hawaii.*

THE UNITED STATES OF AMERICA,

Plaintiff and Petitioner,

vs.

JOHN II ESTATE, LIMITED, and Hawaiian Cor-
poration; CARL S. HOLLOWAY; IRENE
II HOLLOWAY; FRANCIS II HYDE
BROWN; GEORGE II BROWN; IRENE
II HOLLOWAY, as Guardian of the Per-
sons and Estates of FRANCIS II HYDE
BROWN and GEORGE II BROWN; and
CHARLES A. BROWN, JOHN A. MA-
GOON, ALFRED W. CARTER, SYDNEY
M. BALLOU and IRENE II HOLLOWAY,
Directors of the JOHN II ESTATE, LIM-
ITED,

Defendants and Respondents.

Stipulation.

IT IS HEREBY STIPULATED AND AGREED
by and between the parties hereto, that the trial in
this case shall be had by the Court without the inter-

vention of a jury; trial by jury being now expressly waived.

THE UNITED STATES OF AMERICA,

By (Sgd.) ROBT. W. BRECKONS,

U. S. Atty.

JOHN H EST., LIMITED,

By Its Attys.,

(Sgd.) MAGOON & LIGHTFOOT.

IRENE H HOLLOWAY,

CARL S. HOLLOWAY,

ALFRED W. CARTER,

SIDNEY M. BALLOU,

By Their Attorneys,

(Sgd.) BALLOU & MARX.

(Sgd.) A. G. M. ROBERTSON,

Guardian *ad Litem* of George H Brown and Francis
Hyde H Brown.

[Endorsed]: No. 47. (Title of Court and Cause.)
Stipulation. Filed Sept. 10th, 1906. (Sgd.) Frank
L. Hatch, Clerk. [22]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

THE UNITED STATES OF AMERICA,

Plaintiff and Petitioner,

vs.

JOHN H ESTATE, LIMITED, an Hawaiian Cor-
poration; CARL S. HOLLOWAY; IRENE
H HOLLOWAY; FRANCIS H HYDE
BROWN; GEORGE H BROWN; IRENE
H HOLLOWAY, as Guardian of the Per-

sons and Estates of FRANCIS II HYDE BROWN and GEORGE II BROWN; and CHARLES A. BROWN, JOHN A. MAGOON, ALFRED W. CARTER, SIDNEY M. BALLOU and IRENE II HOLLOWAY, Directors of the JOHN II ESTATE, LIMITED.

Defendants and Respondents. [23*—1†]

Judgment.

The above-entitled cause came on in said court regularly for trial on Monday, the 10th day of September, A. D. 1906, as to the issues joined therein between the above-named plaintiff and petitioner and the above-named defendants and respondents, Robert W. Breckons, Esq., United States Attorney in and for the Territory and District of Hawaii, appearing on behalf of said plaintiff and petitioner; and Messrs. Ballou & Marx appearing on behalf of Carl S. Holloway; Irene Ii Holloway; Irene Ii Holloway, as Guardian of the Persons and Estates of Francis Hyde Ii Brown (sued herein as Francis Ii Hyde Brown), and George Ii Brown, Alfred W. Carter, Sidney M. Ballou and Irene Ii Holloway, Directors of the John Ii Estate, Limited; and A. G. M. Robertson, Esq., appearing on behalf of and as the guardian ad litem for Francis Hyde Ii Brown (sued herein as Francis Ii Hyde Brown) a minor, and George Ii Brown, a minor; and Messrs. Magoon & Lightfoot appearing on behalf of John Ii Estate.

* Page-number appearing at foot of page of original certified Record.

[† Original page-number appearing at foot of page of the Judgment in the Original Certified Record.]

Limited, an Hawaiian Corporation, and Charles A. Brown and John A. Magoon, Directors of the John Ii Estate, Limited.

Said cause was then and there duly and regularly heard by and before Honorable Sanford B. Dole, Judge of the above-entitled court, sitting without a jury, a trial of said cause by jury having been theretofore waived in and by the written consent and stipulation of all of the parties to the [24—2] above-entitled action, said written stipulation being now in the files of said cause and court, and also then and there in open court duly and regularly waived by all of the parties to the above-entitled action, said waiver of said jury trial being then and there duly and regularly entered upon the minutes of said court. Witnesses were sworn and examined, and documentary evidence introduced, on behalf of the respective parties; and after hearing the evidence and the argument of counsel, the said cause was thereupon, by all of said parties, submitted to the aforesaid Court for decision.

And said Court having considered the premises, and being fully advised as to the same:

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows, to wit:

I.

That the real property, to wit, the tract and parcel of land sought by the above-entitled action to be condemned herein, and hereinafter more particularly described, and all the claim, right, title, in-

terest and estate of the above-named defendants and respondents, and of each and every of them, therein and thereto, whether at law or in equity, be and the same are hereby condemned for the public use of the United States of America,—that is to say, for the erection [25—3] and maintenance thereon of a naval station and harbor and channel defense, for the uses and purposes of the Government of the United States of America, and of the War and Navy Departments of said Government, and for the improvement of the harbor and channel leading into Pearl Lochs, sometimes called Pearl Harbor, by removing obstructions therefrom, and widening, deepening and straightening said channel; together with the erection and maintenance upon said tract and parcel of land, and its said appurtenances, of all such public buildings, fortifications, magazines, arsenals, navy-yards, lighthouses, range and beacon lights, quarantine station, pesthouses, hospitals, wharves, docks, piers, dams, bridges, cemetaries, reservoirs, roads, canals, ditches, flumes, aqueducts, pipe-lines, and sewers, as may be proper or necessary to or for the efficient maintenance of said naval station and harbor and channel defense, and to and for the uses and purposes therein of said Government and of its said War and Navy Departments; and that the above-named plaintiff and petitioner have, take, hold and acquire said real property, to wit, said tract and parcel of land and its appurtenances, except the fishery and fishing rights in fee simple absolute, for the public uses and purposes hereinabove referred to and set out.

II.

That the value of all improvements upon the aforesaid tract and parcel of land hereby condemned in the above-entitled action, and to which the aforesaid defendants and respondents, or such of them as may hereafter be adjudged to [26—4] be entitled thereto, are entitled to be paid as compensation for the taking of the same by said plaintiff and petitioner, be, and the same is hereby fixed and determined to be nothing.

III.

That the value of the aforesaid real property and its appurtenances, to wit, the aforesaid tract and parcel of land and its appurtenances, together with all water, riparian, and other rights, and rights of way and other easements incidental or appurtenant thereto, except the fishery and fishing rights, and all the claim, right, title, interest and estate of the aforesaid defendants and respondents, hereby condemned in the above-entitled action, and to which said defendants and respondents, or such of them as may hereafter be adjudged to be entitled thereto, are entitled to be paid as compensation for the taking of the same by said plaintiff and petitioner, be and the same is hereby fixed and determined to be the sum of Ten Thousand Dollars (\$10,000.00), in lawful money of the United States.

IV.

That said sum and amount of Ten Thousand Dollars (\$10,000.00) of lawful money of the United States, hereby fixed and determined to be the value of the aforesaid real property, be deposited by the

above-named plaintiff and petitioner in the registry of this Court; and thereupon all the claim, right, title, interest and estate, whether at law [27—5] or in equity, of the aforesaid defendants and respondents, and each and every of them, in or to the real property, to wit, the tract and parcel of land hereby condemned in the above-entitled action, and hereinafter more particularly described, shall vest in fee simple absolute in the above-named plaintiff and petitioner.

V.

Nothing herein contained shall be construed to impair or prejudice in any way any claim or claims of said defendants and respondents, or of any or either of them, in or to the aforesaid sum and amount of Ten Thousand Dollars (\$10,000.00), and all adverse or conflicting claims to said sum and amount of Ten Thousand Dollars (\$10,000.00) shall hereafter be determined upon such pleadings or written statements of claims as are now on file, or as said defendants and respondents, or any or either of them, may file, or the Court may require, after notice to said defendants and respondents, or to their counsel; and the Clerk of this Court shall give twenty (20) days' notice in writing to said defendants and respondents, and to each of them, or to their counsel, of the hearing of any adverse or conflicting claims to said sum of Ten Thousand Dollars (\$10,000.00). [28—6]

VI.

All costs incurred herein up to and including the signing and filing of this judgment shall be taxed

against said plaintiff and petitioner; and all costs which may accrue after the signing and filing of this judgment shall be taxed against said defendants and respondents, or any or either of them, as the Court shall order.

VII.

That the real property and estate condemned herein, is situated, bounded and described as follows, to wit:

The aforesaid tract and parcel of land and its appurtenances, except the fishery and fishing rights appurtenant to said land, the land of WAIPIO, referred to in the petition of plaintiff and petitioner herein, and in this judgment, and condemned and acquired herein and hereby by the above-named plaintiff and petitioner, for the uses and purposes aforesaid, is situated in the District of EWA, in the Harbor of Pearl Lochs, sometimes called Pearl Harbor, in the Island of Oahu, in the Territory and District of Hawaii, in the United States of America, and is bounded and particularly described as follows, to wit:

Commencing at an initial point determined as follows: From the "Pillar of Stone" at Kaheeka Point, Pearl Harbor, which marks the boundary between Puuloa and Honouliuli, from which point the Government Trig. Station at Salt Lake bears by true azimuth $258^{\circ} 40' 35''$, 25,710 feet, run [29—7] $305^{\circ} 43' 30''$, 2930 feet to said initial point; said initial point is marked by a steel drill driven into a drill hole in the solid coral rock 12 feet from the edge of the sea bluff, and about 210 feet northwest of the

southwest end of an old stone wall across the WAIPIO Peninsula; from this initial point running by true azimuth $242^{\circ} 46'$, 1288 feet across the Peninsula along the remainder of L. C. Award 8241 to JOHN II, to a steel drill in a drill hole in the coral rock $51\frac{1}{2}$ feet from the edge of the sea bluff; from which said last point the Government Trig. station at Salt Lake bears by true azimuth $254^{\circ} 7' 6''$, 22,546 feet; thence the boundary follows the windings of the seacoast at high-water mark around that portion of the Peninsula to the southeast of the line as above described to the initial point.

Containing an area of fifty (50) acres; said tract and parcel of land being the same tract and parcel of land delineated upon that certain map or blue-print attached to and made a part of the petition of the above-named plaintiff and petitioner, now on file in said court in the above-entitled action, to which said map or blue-print reference is hereby expressly made.

Given, made and dated at Honolulu, in the Territory of Hawaii, this 24th day of August, A. D. 1909.

(Sgd.) SANFORD B. DOLE,
Presiding Judge United States District Court, District of Hawaii.

The foregoing Judgment is hereby approved.

(Sgd.) ROBT. W. BRECKONS,
United States Attorney. [30—8]

The above and foregoing JUDGMENT AND DECREE is hereby approved and consented to:

(Sgd.) KINNEY, BALLOU, PROSSER &
ANDERSON,

Attorneys for Carl S. Holloway, Irene Ii Holloway, Irene Ii Holloway, as Guardian of the Persons and Estates of Francis Hyde Ii Brown and George Ii Brown; and Alfred W. Carter, Sidney M. Ballou and Irene Ii Holloway, Directors of the John Ii Estate, Limited.

(Sgd.) A. G. M. ROBERTSON,

Attorney for and Guardian *ad Litem* of Francis Hyde Ii Brown, a Minor, and George Ii Brown, a Minor.

(Sgd.) J. ALFRED MAGOON,

Attorney for John Ii Estate, Limited, an Hawaiian Corporation; and Charles A. Brown and John A. Magoon, Directors of the John Ii Estate, Limited without prejudice to the right to contest the claim of Sidney M. Ballou of being a director of the John Ii Estate, Limited.

[Endorsed]: No. 47. (Title of Court and Cause.) Judgment and Decree. Entered in J. & D. Book 2, at pp. 2-5. Filed August 24, 1909. A. E. Murphy, Clerk. By (Sgd.) A. A. Deas, Deputy Clerk.

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

No. 47.

THE UNITED STATES OF AMERICA,

Plaintiff and Petitioner,

vs.

JOHN II ESTATE, LIMITED, an Hawaiian Corporation; CARL S. HOLLOWAY; IRENE II HOLLOWAY, FRANCIS II HYDE BROWN; GEORGE II BROWN; IRENE II HOLLOWAY, as Guardian of the Persons and Estates of FRANCIS II HYDE BROWN and GEORGE II BROWN; and CHARLES A. BROWN, JOHN A. MAGOON, ALFRED W. CARTER, SIDNEY M. BALLOU and IRENE II HOLLOWAY, Directors of the JOHN II ESTATE, LIMITED,

Defendants and Respondents.

Notice.

To Messrs. Kinney, Ballou, Prosser & Anderson, Attorneys for Carl S. Holloway, Irene Ii Holloway, as Guardian of the Persons and Estates of Francis Hyde Ii Brown and George Ii Brown; and Alfred W. Carter, Sidney M. Ballou and Irene Ii Holloway, Directors of the John Ii Estate, Limited; A. G. M. Robertson, Esq., Attorney for and Guardian *ad Litem* of Francis Hyde Ii Brown, a Minor, and George Ii Brown, a Minor; J. Alfred Magoon,

Esq., Attorney for John Ii Estate, Limited, an Hawaiian Corporation; and Charles A. Brown and John A. Magoon, Directors of the John Ii Estate, Limited:

You are hereby notified that under a Judgment and Decree in the above-entitled cause, duly entered in this court on the 24th day of August, A. D. 1909, it was, amongst other things, provided that the title to certain land therein referred to should vest in the United States, upon payment into the registry of this court of the sum of Ten Thousand Dollars (\$10,000.00), and further provided amongst other things, as follows: [32]

“V.

Nothing herein contained shall be construed to impair or prejudice in any way any claim or claims of said defendants and respondents, or of any or either of them, in or to the aforesaid sum and amount of Ten Thousand Dollars, (\$10,000.00), and all adverse or conflicting claims to said sum and amount of Ten Thousand Dollars (\$10,000.00) shall hereafter be determined upon such pleadings or written statements of claim as are now on file, or as said defendants and respondents, or any or either of them, may file, or the Court may require, after notice to said defendants and respondents or to their counsel; and the Clerk of this court shall give twenty (20) days' notice in writing to said defendants and respondents, and to each of them, or to their counsel, of the hearing of any adverse or conflicting claims to said sum of Ten Thousand Dollars (\$10,000.00.)”

You are further notified that on this day the said

sum of Ten Thousand Dollars (\$10,000.00) has been deposited in the registry of this court, on account of said decree, and that, in accordance with said paragraph V you, and each and all of you, are required within twenty days hereafter, to file such pleadings as you may be advised, concerning the rights of any or either or all of you to said fund.

Dated, Honolulu, T. H., September 21st, A. D. 1909.

(Sgd.) A. E. MURPHY,

Clerk United States District Court. [33]

Due service of the foregoing Notice by receipt of a copy thereof is hereby admitted this 21st day of September, A. D. 1909.

(Sgd.) KINNEY, BALLOU, PROSSER &
ANDERSON,

Attorneys for Carl S. Holloway, Irene Ii Holloway, Irene Ii Holloway, as Guardian of the Persons and Estates of Francis Hyde Ii Brown and George Ii Brown; and Alfred W. Carter, Sidney M. Ballou and Irene Ii Holloway, Directors of the John Ii Estate, Limited.

(Sgd.) A. G. M. ROBERTSON,

Attorney for and Guardian *ad Litem* of Francis Hyde Ii Brown, a Minor, and George Ii Brown, a Minor.

J. ALFRED MAGOON,

By (Sgd.) O. P. SOARES,

Attorney for John Ii Estate, Limited, an Hawaiian Corporation; and Charles A. Brown and John A. Magoon, Directors of the John Ii Estate, Limited.

[Endorsed]: No. 47. (Title of Court and Cause.)
Notice. Filed Sept. 21, 1909. A. E. Murphy, Clerk.
By (Sgd.) A. A. Deas, Deputy Clerk. [34]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

THE UNITED STATES OF AMERICA,
Plaintiff and Petitioner,
vs.

JOHN II ESTATE, LIMITED, an Hawaiian Cor-
poration, et al.,
Defendants and Respondents.

Statement of Claim of The John Ii Estate, Limited.
STATEMENT OF CLAIM TO THE SUM OF
\$10,000.00 IN THE REGISTRY OF THE
COURT.

Now comes the John Ii Estate, Limited, by its attorneys, Magoon & Weaver, and shows to the Court that said John Ii Estate, Limited, claims the sum of Ten Thousand Dollars deposited in the registry of this court on the 21st day of September, 1909, for the reason that the land for which the said Ten Thousand Dollars was paid belonged to the John Ii Estate, Limited, in fee simple; that said land having become vested in John Ii to whom the same was awarded together with other lands, by Award 8241 R. P. 5732, and by the said John Ii was devised in fee to Irene Ii by will admitted to probate in the Supreme Court of the Hawaiian Islands on the 10th day of June, 1870 (See Supreme Court records in Probate, No. 482), and confirmed to said Irene Ii by the decision

of the Supreme Court of the Hawaiian Islands rendered on the 4th day of May, 1897 (See Volume 11, Hawaiian Reports, page 47), and by said Irene Ii and her husband, Charles A. Brown, conveyed to Henry Holmes as trustee by deed dated on the 2nd day of July, 1897, and by said Henry Holmes conveyed to [35] said John Ii Estate, Limited, by deed dated on the 9th day of July, 1897, recorded in the Registry Office, Oahu, in Liber 172, page 127, and confirmed to the said Estate by decision of the Supreme Court of the Territory of Hawaii, rendered November 21, 1903. (See Volume 15, Hawaiian Reports, page 308.)

That the right of the John Ii Estate, Limited to said money is *res judicata*;

That all the other defendants herein are estopped to claim any of said money;

That no person other than the said John Ii Estate, Limited, has any interest, right, or claim in said Ten Thousand Dollars or any part thereof.

Dated at Honolulu, this 5th day of October, 1909.

JOHN II ESTATE, LIMITED.

By Its Attorneys,

(Sgd.) MAGOON & WEAVER.

[Endorsed]: No. 47. (Title of Court and Cause.)
Statement of Claim to the Sum of \$10,000.00 in the
Registry of the Court. Dated September 29, 1909.
Filed Oct. 6, 1909. (Sgd.) A. E. Murphy, Clerk.
[36]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

No. 47.

THE UNITED STATES OF AMERICA,
Plaintiff and Petitioner,
vs.

JOHN II ESTATE, LIMITED, an Hawaiian Corporation; CARL C. HOLLOWAY; IRENE II HOLLOWAY; FRANCIS II HYDE BROWN; GEORGE II BROWN; IRENE II HOLLOWAY, as Guardian of the Persons and Estates of FRANCIS II HYDE BROWN and GEORGE II BROWN; and CHARLES A. BROWN, JOHN A. MAGOON, ALFRED W. CARTER, SIDNEY M. BALLOU and IRENE II HOLLOWAY, Directors of the JOHN II ESTATE, LIMITED,

Defendants and Respondents.

Statement of Claim of Francis Hyde Ii Brown.

STATEMENT OF CLAIM OF FRANCIS HYDE II BROWN, A MINOR, IN AND TO THE FUND OF \$10,000 ON DEPOSIT IN THE REGISTRY OF THIS COURT.

Now comes Francis Hyde Ii Brown, a minor, one of the respondents in the above-entitled cause, by A. G. M. Robertson, his guardian *ad litem*, and makes and files his claim to an interest in and to the fund of deposit in the registry of this Court, as follows:

1.

That the land described in the petition in the above-

entitled cause, and for which the said sum of \$10,000 has been paid by the petitioner into the registry of said Court, was formerly owned by John Ii, since deceased.

2.

That said John Ii, at the time of his death was seised and possessed of said land for an estate in fee simple, and [37] that said John Ii, by his last will and testament, which was duly admitted to probate in and by the Supreme Court of the Hawaiian Islands on the 10th day of June, 1870, devised said land to his daughter, Irene Ii, for life, and upon her death to her children, or, in the event of her not having borne children, then to her mother, Māraea Ii, if then living, and, if not, then to the testator's brother, J. K. Komeikehuehu.

3.

That thereafter the said Irene Ii became the wife of C. A. Brown, and is now the wife of C. S. Holloway; and as the result of her marriage with said C. A. Brown, had three children, namely, this claimant, Francis Hyde Ii Brown, and George Ii Brown, also one of respondents named in the above-entitled cause, and Bernice Ii Brown, who died in infancy in the year 1894; and that she has given birth to no other children.

4.

That by reason of the foregoing facts this claimant became the owner of an undivided interest in said land in fee simple, and is now entitled to a one-third share or interest in said fund, subject to the life interest therein of the said Irene Ii Holloway, or the said

John Ii Estate, Limited, as the assignee of her life interest.

5.

That, answering the statement of claim of said John Ii Estate, Limited, filed in said cause, this claimant says that the opinion of the Supreme Court of the Hawaiian Islands rendered on the 4th day of May, 1897 (Volume 11, Hawaiian Reports, page 47), was and is not binding upon this claimant, and did not affect his title in and to said land, nor his right or claim in or to said fund in court, for the following among [38] other reasons:

1. That the cause in which said opinion was rendered was a suit in equity, and said opinion was rendered upon questions reserved in said suit by the Circuit Judge before whom said suit came on for hearing, but said Circuit Judge was without authority of law or jurisdiction to so reserve said questions in said suit.

2. That said Supreme Court had no jurisdiction or authority to hear, determine or otherwise pass on the questions so reserved as aforesaid.

3. That said Supreme Court at the time of the rendition of said opinion was composed or constituted of Associate Justice Whiting (of said Court) and two members of the bar of said Court, namely, W. R. Castle, Esq., and Paul Neumann, Esq., who sat as substitute Justices in said cause at the request of said Associate Justice Whiting; but said request was made without any right or authority of law, and said Court as so composed and constituted was not a legally constituted court, and its said opinion was

therefore without any legal effect.

4. That this claimant was not a party to said suit.

5. That the purported attempt of A. F. Judd to represent this claimant in said suit as his next friend was illegal, null and void, in that said A. F. Judd was at the same time acting, or purporting to act, as the next friend of this claimant's mother whose interests in said suit were adverse to this claimant's interests therein on the question as to the nature of the estate in said land devised to her in and by said will.

6. That the jurisdiction of said Supreme Court, if it ever acquired jurisdiction, in said suit, was, under the pleadings in said suit, limited to the determination [39] of the question whether any trust was then in existence concerning the property devised by said will, and that its jurisdiction ended upon its determining that no such trust existed.

7. That no judgment, order or decree was ever made in any of the aforesaid proceedings in said suit in equity, pursuant to said opinion of said Supreme Court, or otherwise, adjudicating or determining the rights of this claimant under said will in any of the property therein or thereby devised.

6.

That, further answering the statement of claim of said John Ii Estate, Limited, this claimant says that the opinion of the Supreme Court of the Territory of Hawaii rendered on November 21, 1903 (Volume 15, Hawaiian Reports, page 308), did not adjudicate or determine this claimant's right or title in any of the property devised by the will of said John Ii, de-

ceased, and does not affect this claimant's right or claim in or to said fund in court.

7.

That, for greater certainty, this claimant craves leave, upon the hearing hereof, to offer in evidence full and correct copies of said will of John I, deceased, and of the records of the courts in the several proceedings and causes hereinabove referred to.

WHEREFORE, this claimant prays that his right and interest in and to said fund in court may be held and adjudged to be in accordance with his claims as hereinbefore stated; and that the same be protected by such order, judgment or decree of this Honorable Court as the facts and the law may require.

FRANCIS HYDE II BROWN,

By his Guardian *ad litem*,

(Sgd.) A. G. M. ROBERTSON. [40]

[Endorsed]: No. 47. (Title of Court and Cause.)
Statement of Claim of Francis Hyde Ii Brown, a Minor, in and to the fund of \$10,000 on Deposit in the Registry of this Court. Filed Oct. 11, 1909. (Sgd.)
A. E. Murphy, Clerk. [41]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

No. 47.

THE UNITED STATES OF AMERICA,

Plaintiff and Petitioner,

vs.

JOHN II ESTATE, LIMITED, an Hawaiian Corporation; CARL C. HOLLOWAY; IRENE II HOLLOWAY; FRANCIS II HYDE

BROWN; GEORGE II BROWN; IRENE II HOLLOWAY, as Guardian of the Persons and Estates of FRANCIS II HYDE BROWN and GEORGE II BROWN; and CHARLES A. BROWN, JOHN A. MAGOON, ALFRED W. CARTER, SIDNEY M. BALLOU and IRENE II HOLLOWAY, Directors of the JOHN II ESTATE, LIMITED,

Defendants and Respondents.

Statement of Claim of George Ii Brown.

STATEMENT OF CLAIM OF GEORGE II BROWN IN AND TO THE FUND OF \$10,000 ON DEPOSIT IN THE REGISTRY OF THIS COURT.

Now comes George Ii Brown, impleaded herein as a minor, and says that he arrived at the age of majority on the 18th day of October, 1907, and now, in his own right, makes and files his claim to an interest in and to the fund on deposit in the registry of this Court, as follows:

1.

That the land described in the petition in the above-entitled cause, and for which the said sum of \$10,000 has been paid by the petitioner into the registry of said Court, was formerly owned by John Ii, since deceased.

2.

That said John Ii, at the time of his death, was seised and possessed of said land for an estate in fee simple, and that said John Ii, by his last will and testament, which was duly [42] admitted to probate in and by the Supreme Court of the Hawaiian

Islands on the 10th day of June, 1870, devised said land to his daughter, Irene Ii, for life, and upon her death to her children, or, in the event of her not having borne children, then to her mother, Maraea Ii, if then living, and, if not, then to the testator's brother, J. K. Komoikehuehu.

3.

That thereafter the said Irene Ii became the wife of C. A. Brown, and is now the wife of C. S. Holloway; and as the result of her marriage with said C. A., Brown, had three children, namely, this claimant, George Ii Brown and Francis Hyde Ii Brown, also one of the respondents named in the above-entitled cause, and Bernice Ii Brown, who died in infancy in the year 1894; and that she has given birth to no other children.

4.

That by reason of the foregoing facts this claimant became the owner of an undivided interest in said land in fee simple, and is now entitled to a one-third share or interest in said fund, subject to the life interest therein of the said Irene Ii Holloway, or the said John Ii Estate, Limited, as the assignee of her life interest.

5.

That, answering the statement of claim of said John Ii Estate, Limited, filed in said cause, this claimant says that the opinion of the Supreme Court of the Hawaiian Islands rendered on the 4th day of May, 1897 (Volume 11, Hawaiian Reports, page 47), was and is not binding upon this claimant, and did not affect his title in and to said land, nor his right or

claim in or to said fund in court, for the following among other reasons:

1. That the cause in which said opinion was rendered was a suit in equity, and said opinion was rendered upon [43] questions reserved in said suit by the Circuit Judge before whom said suit came on for hearing; but said Circuit Judge was without authority of law or jurisdiction to so reserve said questions in said suit.

2. That said Supreme Court had no jurisdiction or authority to hear, determine or otherwise pass on the questions so reserved as aforesaid.

3. That said Supreme Court at the time of the rendition of said opinion was composed or constituted of Associate Justice Whiting (of said Court) and two members of the bar of said Court, namely, W. R. Castle, Esq., and Paul Neumann, Esq., who sat as substitute Justices in said cause at the request of said Associate Justice Whiting; but said request was made without any right or authority of law, and said Court as so composed and constituted was not a legally constituted court, and its said opinion was therefore without any legal effect.

4. That this claimant was not a party to said suit.

5. That the purported attempt of A. D. Judd to represent this claimant in said suit as his next friend was illegal, null and void, in that said A. F. Judd was at the same time acting or purporting to act, as the next friend of this claimant's mother whose interests in said suit were adverse to this claimant's interests therein on the question as to the nature of the estate in said land devised to her in and by said will.

6. That the jurisdiction of said Supreme Court, if it ever acquired jurisdiction, in said suit, was, under the pleadings in said suit, limited to the determination of the question whether any trust was then in existence concerning the property devised by said will, and that its [44] jurisdiction ended upon its determining that no such trust existed.

7. That no judgment, order or decree was ever made in any of the aforesaid proceedings in said suit in equity pursuant to said opinion of said Supreme Court, or otherwise, adjudicating or determining the rights of this claimant under said will in any of the property therein or thereby devised.

6.

That, further answering the statement of claim of said John Ii Estate, Limited, this claimant says that the opinion of the Supreme Court of the Territory of Hawaii rendered on November 21, 1903 (Volume 15, Hawaiian Reports, page 308), did not adjudicate or determine this claimant's right or title in any of the property devised by the will of said John Ii, deceased, and does not affect this claimant's right or claim in or to said fund in court.

7.

That, for greater certainty, this claimant craves leave, upon the hearing hereof, to offer in evidence full and correct copies of said will of John Ii, deceased, and of the records of the courts in the several proceedings and causes hereinabove referred to.

WHEREFORE, this claimant prays that his right and interest in and to said fund in court may be held and adjudged to be in accordance with his claims as

hereinbefore stated, and that the same be protected by such order, judgment or decree of this Honorable Court as the facts and the law may require.

GEORGE II BROWN,

Claimant,

By His Attorney,

(Sgd.) A. G. M. ROBERTSON.

[45]

[Endorsed]: No. 47. (Title of Court and Cause.) Statement of Claim of George Ii Brown in and to the fund of \$10,000 on deposit in the Registry of this Court. Filed, Oct. 11, 1909. (Sgd.) A. E. Murphy, Clerk. [46]

*In the District Court of the United States for the
District and Territory of Hawaii.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN II ESTATE, LIMITED, et al.,

Defendants.

**Stipulation [for Substitution of Mr. Wilder as
Guardian ad Litem].**

It is hereby stipulated by the parties hereto that Arthur A. Wilder, Esq., may be substituted for and appointed by the Court in place of A. G. M. Robertson, Esq., as guardian *ad litem* of Francis Hyde Ii

Brown, a minor, one of the defendants in the above-entitled cause.

Dated January 31, 1910.

JOHN II ESTATE, LIMITED,

By Its Attorneys,

(Sgd.) MAGOON & WEAVER.

(Sgd.) A. G. M. ROBERTSON,

Guardian *ad litem* of Francis Hyde Ii Brown, and
Attorney for George Ii Brown.

[Endorsed]: (Title of Court and Cause.) Stipulation. Filed Jan. 31, 1910. A. E. Murphy, Clerk.
By (Sgd.) A. A. Deas, Deputy Clerk. [47]

*In the District Court of the United States for the
District and Territory of Hawaii.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN II ESTATE, LIMITED, et al.,

Defendants.

Order [Appointing Mr. Wilder Guardian ad Litem].

Pursuant to the stipulation of parties filed in this cause this 31st day of January, 1910, Arthur A. Wilder, Esq., is hereby appointed guardian *ad litem* of Francis Hyde Ii Brown, a minor, one of the defendants in the above-entitled cause.

Dated January 31, 1910.

(Sgd.) S. B. DOLE,

Judge, U. S. District Court for Hawaii.

O. K.—J. A. M.

54 *The John Ii Estate, Limited, et al.*

[Endorsed]: (Title of Court and Cause.) Order.
Filed Jan. 31, 1910. A. E. Murphy, Clerk. By
(Sgd.) A. A. Deas, Deputy Clerk. [48]

*In the District Court of the United States for the
District and Territory of Hawaii.*

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN II ESTATE, LIMITED, et al.,
Defendants.

Withdrawal of Former Guardian ad Litem.

The undersigned hereby withdraws from the above-
entitled cause as guardian *ad litem* of Francis Hyde
Ii Brown, a minor, one of the defendants.

Dated, Honolulu, January 31, 1910.

(Sgd.) A. G. M. ROBERTSON.

[Endorsed]: No. 47. (Title of Court and Cause.)
Withdrawal of Guardian *ad Litem*. Filed Jan. 31,
1910. A. E. Murphy, Clerk. By (Sgd.) A. A. Deas,
Deputy Clerk. A. G. M. Robertson. [49]

*In the District Court of the United States for the
District and Territory of Hawaii.*

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN II ESTATE, LIMITED, et al.,
Defendants.

Appearance for George Ii Brown and Arthur A. Wilder.

APPEARANCE FOR GEORGE II BROWN AND ARTHUR A. WILDER, GUARDIAN AD LITEM OF FRANCIS HYDE II BROWN, A MINOR.

Now come Thompson, Clemons & Wilder and enter their appearance herein as counsel for George Ii Brown and Arthur A. Wilder, guardian *ad litem* of Francis Hyde Ii Brown, a minor, two of the defendants in the above-entitled cause.

Dated Honolulu, February 1, 1910.

(Sgd.) THOMPSON, CLEMONS & WILDER.

[Endorsed]: No. 47. (Title of Court and Cause.) Appearance for George Ii Brown and A. A. Wilder, Guardian *ad Litem* of Francis Hyde Ii Brown, a minor. Filed Feb. 1st, 1910. A. E. Murphy, Clerk. By (Sgd.) A. A. Deas, Deputy Clerk. Thompson, Clemons & Wilder, 3-11 Campbell Block, Honolulu, Attorneys for Defendant. [50]

In the District Court of the United States in and for the District and Territory of Hawaii.

No. 47.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN II ESTATE, LIMITED, an Hawaiian Corporation; CARL S. HOLLOWAY; IRENE II HOLLOWAY; FRANCIS HYDE II

BROWN; GEORGE II BROWN; IRENE II HOLLOWAY, as Guardian of the Persons and Estates of FRANCIS HYDE II BROWN and GEORGE II BROWN; and CHARLES A. BROWN; JOHN A. MAGOON; ALFRED W. CARTER, SIDNEY M. BALLOU and IRENE II HOLLOWAY, Directors of the JOHN II ESTATE, LIMITED,

Defendants.

Notice of Presentation of Bill of Exceptions.

To the Above-named Charles F. I. Brown, Francis H. Brown, A. A. Wilder, Guardian *ad Litem* of F. H. I. Brown, Defendants Above Named, and to Their Attorneys, Thompson & Wilder,

You and each of you will please take notice hereby that on this 17th day of March, A. D. 1911, we have filed in this Court and with the Clerk thereof, the bill of exceptions of the above-named defendants: John Ii Estate, Limited, and J. Alfred Magoon and C. A. Brown, Directors of John Ii Estate, Limited, and petitioners in the above-entitled cause; and that on the 18th day of March, A. D. 1911, at 10 A. M. we shall present said bill of exceptions to said Court for settlement [51] and certification.

Dated at Honolulu, March 17, 1911.

(Sgd.) MAGOON & WEAVER,

Attorneys for John Ii Estate, Limited, J. A. Magoon and C. A. Brown.

ADMISSION OF SERVICE OF COPY OF
NOTICE OF PRESENTATION OF BILL OF
EXCEPTIONS.

Service of copy of Notice of Presentation of Bill
of Exceptions admitted this 17th day of March, 1911.

THOMPSON, CLEMONS & WILDER,

(Sgd.) F. E. T.,

Attorneys for George F. I. Brown, Francis H. I.
Brown, a Minor, A. A. Wilder, Guardian *ad*
Litem of Francis H. Brown, a Minor,
Defendants.

Attorneys for Alfred W. Carter, Sidney M. Ballou
and Irene Ii Holloway, Directors of John Ii
Estate, Limited, Defendants.

[Endorsed]: No. 47. (Title of Court and
Cause.) Notice of Presentation of Bill of Excep-
tions. Filed March 17th, 1911. A. E. Murphy,
Clerk. By (Sgd.) F. L. Davis, Deputy Clerk.
Magoon & Weaver, 188 Merchant St., Honolulu, T.
H., Attorneys for John Ii Est., Ltd., et al. [52]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

#47.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN II ESTATE, LIMITED, an Hawaiian Cor-
poration; CARL S. HOLLOWAY; IRENE
II HOLLOWAY; FRANCIS HYDE II

BROWN; GEORGE II BROWN; IRENE II HOLLOWAY, as Guardian of the Persons and Estates of FRANCIS HYDE II BROWN and GEORGE II BROWN; and CHARLES A. BROWN; JOHN A. MAGOON; ALFRED W. CARTER; SIDNEY M. BALLOU and IRENE II HOLLOWAY, Directors of the JOHN II ESTATE, LIMITED,

Defendants.

Bill of Exceptions.

Be it remembered that on the 2d day of December, A. D. 1909, at a stated term of the said Court, begun and held in Honolulu, in the City and County of Honolulu, in and for the District and Territory of Hawaii, before his Honor, Sanford B. Dole, District Judge, the issues joined in the above-stated cause, between the said parties defendant, came on to be heard before the Court, sitting without a jury, trial by jury being expressly waived by stipulation of all said claimants filed herein, the United States having no interest in the claim, not being represented, and Magoon & Weaver appearing for John Ii Estate, Limited, an Hawaiian Corporation, and A. G. M. Robertson, Esq., appearing for George Ii Brown and as attorney and guardian ad litem for Francis Hyde Ii Brown, and said A. G. M. Robertson being succeeded by A. A. Wilder, [55*—1†] Esq., of the firm of Thompson, Clemons & Wilder, representing the said George Ii Brown, A. A. Wilder, guardian ad litem for Francis Hyde Ii Brown, and the follow-

* Page-number appearing at foot of page of original certified Record.

[†Original page-number appearing at foot of page of the Bill of Exceptions in the original certified Record.]

ing proceedings being had, the plaintiff then offered in evidence the stipulation admitting certain facts, which stipulation is in words and figures as follows:

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

THE UNITED STATES OF AMERICA,

Plaintiff and Petitioner,

vs.

JOHN II ESTATE, LIMITED, an Hawaiian Corporation, et al.,

Defendants, and Respondents.

Agreement as to Certain Facts.

The following facts are hereby agreed upon in this cause:

1. That the land condemned by the United States of America in this cause is a portion of the ahupuaa of Waipio, which is mentioned in the will of John Ii.

2. That the fee simple title to the ahupuaa of Waipio was vested in John Ii at the time of his death.

3. That John Ii died in the year 1870 leaving a will, the original of which is in the Hawaiian language and a correct translation of which is hereto attached and made a part hereof, and to which reference is hereby made.

4. That the defendant Irene Ii Holloway is the daughter of said John Ii, deceased, and is the Irene Haalou Ii named in said will. [56—2]

5. That said Irene was lawfully married to Charles A. Brown on the 30th day of September, 1886, and divorced from him on the 29th day of May,

1898, and is now the wife of C. S. Holloway.

6. That the issue of the marriage between said Irene and said Brown was three children as follows: George Ii, Francis Hyde Ii, both defendants herein, and Bernice Ii who died in infancy in the year 1894; and said Irene has given birth to no other children.

7. That the said Irene Haalou and said Charles A. Brown conveyed, *inter alia*, their interest in said ahupuaa of Waipio to Henry Holmes, Trustee; that said Henry Holmes *inter alia* conveyed said interest in said ahupuaa of Waipio to an Hawaiian Corporation known as the John Ii Estate, Limited, by deeds, copies of which are hereto attached and made a part hereof, and to which reference is hereby made.

8. That the stock of said John Ii Estate, Limited, was issued according to the terms of said deed, the holders thereof being as follows:

Irene Ii Holloway.....499 shares

C. A. Brown.....499 “

Henry Holmes, Trustee for

George Ii Brown and Francis

Hyde Ii Brown, in equal

shares499 “

9. That the shares to which said George Ii Brown was entitled, held by Henry Holmes, as aforesaid, were turned over to him after he attained majority and that he attained majority on the 18th day of October, 1907.

10. That since said George Ii Brown attained majority he has received and accepted the dividends which were due and payable [57—3] on his shares, said dividends being declared monthly prior to and

ever since the said George attained his majority.

Honolulu, T. H., December 2d, 1909.

/S/ JOHN II ESTATE, LIMITED,

By Its Attorneys,

MAGOON & WEAVER.

/S/ GEORGE II BROWN,

By His Attorney,

A. G. M. ROBERTSON.

/S/ A. G. M. ROBERTSON,

Guardian *ad litem* of Francis Hyde Ii Brown.

Translation of the Will of John Ii, Deceased, Incorporated in Agreement as to Certain Facts.

Before Almighty God, Amen. I, John Ii, of the City of Honolulu, Island of Oahu, Hawaiian Islands, have made and am now making my will and do declare publicly that this is my last will and testament.

After paying all my debts, all my property both real and personal shall descent to my heirs who are mentioned below as follows:

First. Irene Haalou Ii, my own daughter is the first heir as follows:

The land of Halaape, Kohala, Island of Hawaii.

The land of Waipunaulaiki, South Kona, Hawaii.

The land bequeathed by Henrietta Kaleemakalii called "Aleemai," Hana, Island of Maui.

Two pieces of land, Kapunakea, Lahaina, Maui.

One loi in Uhao, Lahaina, Maui.

One Ahupuaa Keopukapaeole in Molokai. [58—4]

On the Island of Oahu. One iliaina at Makiki Kancialoha the source of water down to Pawaa.

One house lot in Kamakela in Honolulu. One kuleana in Waiakemi in Honolulu. One kuleana Paakiko Maemae. One ahupuaa of Waipio in Ewa and one kuleana of Kekela (w) deceased now belonging to me at Kee, Haena, Island of Kauai, and one-half of all my personal property.

Second. My wife Maraea Ii is my second heir. One land in Hilo being the kuleana of Laumania purchased by me. One iliaina Makana in Koolauloa, Oahu, and one-half of all my personal property; and in case my wife marries again this land shall descend to my daughter, she cannot bequeath to any one.

Third. My brother, J. Komoikehuehu is the third heir. One iliaina Homaikaia in Waipio, Ewa, Oahu, and one deeded land the half of Auiole at Waikele, Ewa, Oahu, and one iliaina Kaluapulu, Kalihi, Oahu; those are the lands I bequeath to him.

Fourth. My interest in the land of G. Naaihelu, my deceased younger brother is for his widow Kamealani.

Fifth. My land which I bought being the lot at Pawaa, adjoining Dr. Judd's land on the Waikiki side of the road leading to Waikiki is for A. F. Judd, and that is his land that I bequeath to him.

By this will I have appointed and I do hereby appoint J. Komoikehuehu, A. F. Judd, they both to be the executors and guardians of the person and property of my daughter the first devisee mentioned in this will.

All the income from the lands that are leased and all other receipts from all the lands of my daughter

they two alone shall have the sole care of it until she becomes of age or has children of her own; they shall be the executors during the lifetime of my daughter and her children in accordance with my wishes as expressed in this will, and they shall receive compensation the same as provided by law.
[59—5]

My executors shall place my daughter in some suitable place where she may be educated in both languages, and my child must be brought up in the path of rectitude, and the first fruits received from the lands of my daughter, that is, the money received, there shall be taken therefrom ten cents from each dollar which is set apart as an offering to God's Kingdom the same as I have done. And my executors are to carry out this request of mine.

And further, if my daughter should die having borne children, then the property shall descend to her children and if she should die without having had any children the property shall descend to her own mother, and if she should be dead then the property shall descend to my brother J. Komoikehuchu.

In witness of the truth of this I have hereunto signed my name with my own hand and affixed my seal this 28th day of April, A. D. 1870.

His
IOANE IL. X
Mark.

Witnesses:

D. B. MAHOE.

A. KAHANU.

W. L. MOEHONUA.

**Exhibit "A" Incorporated in Agreement as to
Certain Facts.**

THIS INDENTURE made this 2d day of July, 1897, between Irene Ii Brown, of Honolulu, Oahu, party of the first part, C. A. Brown, her husband, of said Honolulu, party of the second part, and Henry Holmes, of said Honolulu, hereinafter designated the Trustee, party of the third part.

WITNESSETH: That the said parties of the first and second parts in consideration of One Dollar to each of them paid by the said party of the third part the receipt whereof is hereby acknowledged, hereby give, grant, bargain, sell and convey unto the said party of the third part and his heirs: [60—6]

All and singular the lands situate in the Hawaiian Islands belonging to the parties of the first and second part or either of them and all their right, title and interest whether by curtesy, dower or otherwise in and to the lands of each other situate in the Hawaiian Islands together with the partnership agreement dated the 6th day of September, 1893, between the party of the second part and Lincoln McCandless, also all contracts and agreements whether by lease or otherwise relating to the said lands; also all live stock belonging to the said parties of the first and second parts or either of them in the Hawaiian Islands; and also all mortgages and notes secured by mortgage held by the parties of the first and second parts or either of them.

TO HAVE AND TO HOLD the said lands and hereditaments unto the said Henry Holmes, his heirs, successors in trust and assigns forever, and

the other said property unto the said Henry Holmes, his executors, administrators, successors in trust and assigns forever upon the following trusts: That is to say:

To convey all the said property to the corporation to be formed as hereinafter mentioned for the only proper use and behoof of the said corporation.

To forthwith form a corporation under the laws of the Republic of Hawaii having a limited liability upon and subject to the following terms and conditions:

First: Said corporation shall be incorporated by the following named parties, Irene Ii Brown, Charles A. Brown, Henry Holmes, S. M. Ballou and J. Alfred Magoon unless any one or more of them shall die, refuse to act or become incapacitated from acting, in which case a substitute for the said S. M. Ballou may be named by the said Irene Ii Brown, a substitute for the said J. Alfred Magoon may be named by the said C. A. Brown and a substitute for any of the others may be named by a majority of those who shall act and in case the parties nominating shall be equally [61—7] divided then, and in such case, such substitute may be named by the party of the third part.

Second: The capital stock of said corporation shall be One Hundred and Fifty Thousand Dollars (\$150,000) divided into one thousand five hundred shares of a par value of One Hundred Dollars (\$100) each and shall be distributed as follows:

The John Ii Estate, Limited, et al.

Charles A. Brown.....	499	shares
Henry Holmes, Trustee for George Ii Brown and Francis Hyde Brown	499	“
Henry Holmes, Trustee for Irene Ii Brown	499	“
J. Alfred Magoon	1	“
S. M. Ballou	1	“
Henry Holmes	1	“
<hr/>		
Total, 1,000		“

Third: The name of the corporation shall be
“John Ii Estate, Limited.”

Fourth: The objects of the Company shall be as
follows:

1. To manage the property as a whole.
2. To farm and (or) cultivate any portion of the
lands suitable for the purpose.
3. To lease any portion of the lands for any term
receiving payment therefor in produce or otherwise.
4. To divide into house lots any portion of said
land and to sell or lease the same.
5. To carry on the business of ranching, butcher-
ing and (or) forestry.
6. To advance money on mortgage of lands,
produce or any real or personal property.
7. To improve any of the lands of the said cor-
poration in any manner whatsoever. [62—8]
8. To carry on any of the aforesaid businesses
either solely or jointly with any persons or other
corporations.

Fifth: The officers of said corporation shall con-

sist of a President, First Vice-President, Second Vice-President, Treasurer, Secretary and Auditor. The officers other than the Auditor shall be the Directors of the Company.

Sixth: The said Henry Holmes shall be appointed President of the Company; the said J. Alfred Magoon, First Vice-President; the said Irene Ii Brown, Second Vice-President; the said C. A. Brown, Treasurer and Manager; and the said S. M. Ballou, Secretary. The Auditor shall be appointed at the first meeting of the share holders after incorporation.

Seventh: The officers and directors shall continue to hold office for one year and thereafter until their successors are appointed.

Eighth: The future officers of the Company other than the Auditor shall be appointed by the shareholders representing not less than three-fourths of all the shares of the Company.

Ninth: The Auditor need not be a shareholder of the Company; he shall be appointed by shareholders representing a majority of all the shares of the Company.

Tenth: The Company shall have power to buy and hold shares of stock in the Company or in any other corporation whether the shares of said last mentioned corporation are fully paid up or only partially paid up; and also to buy any of the same shares for its own use and not on commission; also to buy, sell, lease, mortgage, exchange and otherwise manage any real and personal estate at any time owned by the corporation or any easement or rights in con-

nection with such real estate but no real estate belonging to the Company shall be mortgaged, conveyed or sold except by a vote of a majority of the Directors of the Company. [63—9]

Eleventh: The Treasurer and Manager of the Company shall have power from time to time to sell, in the way of trade, personal property of the corporation and to grant leases for a term not exceeding five (5) years of any land of a less annual value than Two Hundred and Fifty Dollars (\$250).

Twelfth: The salary of the Treasurer and Manager shall be fixed by the Directors. So long as the said C. A. Brown shall act as Treasurer and Manager he shall be paid a salary of not less than Fifty Dollars (\$50) nor more than One Hundred Dollars (\$100) per month while any of the debts specified shall be unpaid and after the payment of all said debts the said C. A. Brown so long as he shall be Treasurer and Manager shall be paid a salary equivalent to seven and one-half per cent ($7\frac{1}{2}\%$) on all rents and income from the lands and other property and on all gross profits other than rents and income, for his management.

Thirteenth: Until incorporation the said C. A. Brown shall have the management of the Estate.

Fourteenth: The Company shall be liable for and the property shall be conveyed to the corporation subject to the debts mentioned in the schedule hereunder annexed and for any other debts of the parties of the first and second parts that all the parties hereto shall determine before the incorporation of the Company and the profits of the corporation over Six Thousand

Dollars (\$6,000) per annum shall be applied to the payment of such debts.

Fifteenth: All other terms and conditions of said corporation not herein specified shall be in the absolute discretion of the parties of the first and second parts jointly as expressed in writing hereafter signed by them both and in default of such expression then in the absolute discretion of the party of the third part and the said S. M. Ballou and said J. Alfred Magoon or a majority of them. [64—10]

Sixteenth: The five hundred (500) shares of the capital stock of the Oahu Sugar Company subscribed for by the said C. A. Brown and the calls for which are a debt to be paid by the corporation shall be issued one-half or two hundred and fifty (250) shares to and in the name of said Irene Ii Brown and one-half or two hundred and fifty (250) shares to and in the name of said C. A. Brown.

IT IS HEREBY EXPRESSLY agreed and declared that in case of the failure to incorporate within one year of the date hereof for any cause whatever this deed shall be void.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands and seals the day and year first before written.

(Sig.) IRENE II BROWN.

“ C. A. BROWN.

“ HENRY HOLMES.

Hawaiian Islands,
Island of Oahu,—ss.

On this 2d day of July, 1897, personally appeared before me Irene Ii Brown and C. A. Brown her hus-

band and Henry Holmes to me known and known to me to be the persons described in and who executed the foregoing instrument and severally acknowledged that they executed the same freely and voluntarily for the uses and purposes therein set forth. And said Irene Ii Brown on an examination separate and apart from C. A. Brown acknowledged that she executed the same freely without fear or compulsion of her said husband.

[Seal]

(Sig.) DOROTHEA LAMB,

Notary Public [65—11]

**Schedule "A" Incorporated in Agreement as to
Certain Facts.**

KNOW ALL MEN BY THESE PRESENTS, That whereas by an instrument in writing dated the second day of July A. D. 1897, Irene Ii Brown and C. A. Brown, her husband, conveyed to Henry Holmes all those lands, rights, contracts, agreements, live stock, mortgages and notes hereinafter specified upon trust to convey all of the said property to the corporation to be formed according to the conditions herein specified for the only proper use and behoof of the said corporation, and

Whereas, the John Ii Estate, Limited, has been incorporated in accordance with the terms and conditions therein mentioned.

NOW THEREFORE, I, Henry Holmes, Trustee, in consideration of the premises and of One Dollar to me in hand paid by the John Ii Estate, Ltd., a corporation duly organized under the laws of the Hawaiian Islands, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell

and convey unto the said John Ii Estate, Ltd., all and singular the lands situated in the Hawaiian Islands which immediately prior to the execution of said conveyance of July 2nd, 1897, belonging to Irene Ii Brown and C. A. Brown or either of them and all their right, title and interest whether by *courtesy*, dower or otherwise in and to lands situated in the Hawaiian Islands together with the partnership agreement dated the 6th day of September, 1893, between C. A. Brown and Lincoln McCandless, also all contracts, agreements whether by lease or otherwise relating to said lands, also all live stock belonging to the said Irene Ii Brown and C. A. Brown or either of them in the Hawaiian Islands, and also all mortgages and notes secured by mortgage at that time held by the said Irene Ii Brown and C. A. Brown or either of them, hereby intending to convey all and singular the property of whatever description real, personal [66—12] or mixed conveyed to me by said deed of July 2nd, 1897.

TO HAVE AND TO HOLD all and singular the property above described unto the said John Ii Estate, Limited, its successors and assigns forever.

AND we the said Irene Ii Brown and C. A. Brown hereby consent to, join in, and ratify the above conveyance as being a full and complete discharge of the trust imposed upon the said Henry Holmes by the said conveyance dated July 2nd, 1897, and we further remise, release and quit claim unto the said John Ii Estate, Ltd., all our right, title and interest whether by *courtesy*, dower or otherwise in and to the lands and other property hereinabove described.

IN WITNESS WHEREOF, we, the said Henry

Holmes, Irene Ii Brown and C. A. Brown have hereunto set our hands and seals this — day of July, A. D. 1897.

Certificate to Articles of Incorporation, etc., Incorporated in Agreement as to Certain Facts.

Territory of Hawaii,

Honolulu, Oahu.

OFFICE OF THE TREASURER.

I do hereby certify that the foregoing document, is a true and correct copy of the Articles of Incorporation and Affidavit of the John Ii Estate, Ltd., with copy of deed to the corporation attached as filed in the Office of the Minister of the Interior on the 20th day of July A. D. 1897, and of record in this office. That the said document *constitute* the evidence of the incorporation of the John Ii Estate, Limited filed for record under the provisions of Chapter 127 of the Civil Laws of 1897 relating to Corporations.

[Seal]

(Sig.) HENRY C. HAPAI,

Registrar of Public Accounts.

[Endorsed]: 23. No. 47. United States District Court, Territory of Hawaii. United States of America vs. John Ii Estate, Ltd., a Hawaiian Corporation, et al. Agreed Statement of Facts Among Respondents. Filed Dec. 2, 1909. A. E. Murphy, Clerk. /S/ by A. A. Deas, Deputy Clerk. [67—13]

[Recitals Re Certain Offers in Evidence, etc.]

The claimants, Francis Hyde Ii Brown, a minor, by his Guardian *ad litem* and George Ii Brown, by their attorney A. G. M. Robertson, Esq., then offered in evidence a transcript of the Record of the Circuit

Court of the First Judicial Circuit in and for the Territory of Hawaii, Equity #779, Irene Haalau Ii Brown, a married woman, and George Ii Brown and Francis Hyde Ii Brown, minors, by their next friend A. F. Judd, and A. F. Judd, plaintiffs against Charles A. Brown, defendant, which was admitted in evidence and marked Exhibit "1," a copy of which exhibit is attached hereto marked Exhibit "1," and made a part hereof.

The claimants, George Ii Brown and Francis Hyde Ii Brown, a minor, by his guardian *ad litem* A. G. M. Robertson by A. G. M. Robertson, Esq., his attorney, then offered in evidence a transcript of the Record of the proceedings had in the Supreme Court of the Territory of Hawaii in the last named cause on appeal, which transcript was admitted in evidence and marked Exhibit "2," a copy of which record is attached hereto marked Exhibit "2," and made a part hereof.

The claimants, George Ii Brown and Francis Hyde Ii Brown, by his guardian *ad litem*, A. G. M. Robertson, Esq., by A. G. M. Robertson, Esq., their attorney, then offered in evidence a transcript of the Record in the Circuit Court of the First Judicial Circuit in and for the Territory of Hawaii in the cause entitled George Ii Brown and Francis Hyde Ii Brown, a minor, by their next friend A. F. Judd, Plaintiffs, vs. Charles A. Brown, J. Alfred Magoon, Irene Ii Holloway, Defendants, Equity #1324, which Record was admitted in evidence and marked Exhibit "3" and made a part hereof.

The claimants, George Ii Brown and Francis Hyde

Ii Brown, a minor, by his guardian *ad litem*, A. G. M. Robertson, Esq., their attorney, then offered in evidence a transcript of the record [68—14] of the proceedings in the Supreme Court in the Territory of Hawaii on appeal of the cause last above named, a copy of which exhibit is attached hereto marked Exhibit "4," and made a part hereof.

That plaintiff thereon rested.

That thereafter defendant offered in evidence a copy of the articles of incorporation of John Ii Estate, Limited, an Hawaiian Corporation in the files of the Court which is hereby referred to and made a part hereof, and marked Exhibit "5."

That thereafter A. G. M. Robertson, Esq., withdrew as guardian *ad litem* for Francis Hyde Ii Brown, a minor, and an order was made substituting A. A. Wilder, Esq., as guardian *ad litem* for said minor.

That at the same time A. G. M. Robertson, Esq., withdrew as counsel for claimants, George Ii Brown and Francis Hyde Ii Brown, a minor, and thereafter Messrs. Thompson, Clemons & Wilder appeared as attorneys for said last named claimants: Francis Hyde Ii Brown, a minor, and George Ii Brown.

Recitals Re Translation of the Will of John Ii.

That thereafter the Honorable Sanford B. Dole, Judge of the said court, expressing himself as not bound by the translation of the will of John Ii from the Hawaiian language into the English language as contained in the agreed statement of facts filed herein by leave of the Court, the John Ii Estate, Limited, one of the claimants, filed translations of a portion of the will of John Ii deceased, from the Hawaiian

language into the English language made by parties hereinafter named. That the said translations made by the parties respectively named hereafter are hereto attached and made a part hereof, and marked as follows: [69—15]

Translation made by N.B.Emerson, marked Exhibit 6.

“	“	“ O. H. Gulick,	“	“	7.
“	“	“ W. R. Castle,	“	“	8.
“	“	“ Joseph M. Poepoe,	“	“	9.
“	“	“ Henry Smith,	“	“	10.
“	“	“ C. L. Hopkins,	“	“	11.
“	“	“ S. Keliinai,	“	“	12.
“	“	“ Wm. Hyde Rice,	“	“	13.
“	“	“ Francis Gay,	“	“	14.
“	“	“ Emma M. Nakuina	“	“	15.

A translation was procured by the Honorable Judge of the Court, and filed with said cause, made by Henry H. Parker, Esq.; that a copy of such translation is marked Exhibit 16, attached hereto and made a part hereof.

That thereafter the Court asked for oral testimony on the subject of translation of the said will, and the claimant, John Ii Estate, Limited, thereupon produced witnesses.

That a transcript of the testimony of said witnesses is attached hereto marked Exhibit 17, and made a part hereof.

That after the close of the testimony of both parties, and after both parties had rested their case, on September 1, 1910, the Decision of the Court was filed, deciding in favor of the claim of George Ii Brown and Francis Hyde Ii Brown, a minor, a copy of which

Decision is marked Exhibit 18, attached hereto and made a part hereof.

That on October 8, 1910, the Judgment of the Court was filed, a copy of which Judgment is attached hereto marked Exhibit 19, and made a part hereof. [70—16]

Exception No. 1.

That on October 18, 1910, the claimant, John Ii Estate filed a written Exception to the Judgment, as against law, and the evidence, and weight of evidence, which Exception was allowed.

Honolulu, T. H., March —, 1911.

Judge of the United States District Court in and for the Territory of Hawaii.

Admission of Service of Bill of Exceptions.

Service of the within and foregoing proposed Bill of Exceptions in the above-entitled cause is hereby accepted this 17 day of March, A. D. 1911.

(Signed) THOMPSON, CLEMONS & WILDER,
Attorneys for George Ii Brown and Francis Hyde
Brown, a Minor. [71—17]

Order Allowing Bill of Exceptions.

The foregoing Bill of Exceptions is hereby allowed this 18th day of March, 1911, as of the April Term, 1910.

(Sgd.) S. B. DOLE,
Judge United States District Court in and for the
Territory of Hawaii. [72—17A]

**Exhibit No. 1—Transcript of Record in Cause
Entitled Irene Haalou Ii Brown et al. vs.
Charles A. Brown, in the Circuit Court of the
First Judicial Circuit, Territory of Hawaii.**

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

EQUITY No. 779.

**IRENE HAALOU II BROWN, a Married Woman,
and GEORGE II BROWN and FRANCIS
HYDE II BROWN, Minors, by Their Next
Friend, A. D. JUDD, and A. F. JUDD,**

vs.

CHARLES A. BROWN.

TRANSCRIPT OF RECORD. [73—18]

*In the Circuit Court of the First Circuit, Hawaiian
Islands.*

IN EQUITY.

(\$2.00 Stamps.)

**IRENE HAALOU II BROWN, a Married Woman,
and GEORGE II BROWN and FRANCIS
HYDE II BROWN, Minors, by Their Next
Friend A. F. JUDD and A. F. JUDD**

vs.

CHARLES A. BROWN.

Complaint.**BILL TO DECLARE AND EXECUTE A TRUST
AND FOR AN ACCOUNTING.**

To the Hon. W. A. WHITING, First Judge of the
Circuit Court aforesaid.

Irene Haalou Ii Brown, whose maiden name was Irene Haalou Ii, wife of Charles A. Brown, and George Ii Brown and Francis Hyde Ii Brown, minors, by their next friend A. F. Judd, and A. F. Judd, complaining of the said Charles A. Brown, respectfully represent:

1st. That the above complainants and defendant are residents of Honolulu, Island of Oahu.

2nd. That heretofore, to wit, on the 2d day of May, A. D. 1870, one John Ii, a resident of the Island of Oahu, deceased on said Island of Oahu, leaving a large estate in real and personal property, situated on said Island of Oahu and elsewhere in this country, which he devised by will duly admitted to probate in the Supreme Court of the Hawaiian Islands on the 10th day of June, A. D. 1870, a copy of which will is hereto attached marked Exhibit "A," and made a part hereof.

3rd. That upon the 13th day of June, A. D. 1870, your complainant A. F. Judd and one J. Komoikehuehu pursuant to the [76—21] provisions of the said will were appointed executors of said will and guardians of the person and property of one of the beneficiaries named in said will said complainant Irene Haalou Ii Brown then unmarried and being an infant aged about nine months.

4th. That the said A. F. Judd and J. Komoikehuehu duly qualified as such executors and guardians and thereafter duly performed the duties of executors and guardians provided for by said will and by the general law.

5th. That upon the 29th day of January, A. D. 1875, the said J. Komoikehuehu resigned his trust and thereafter in the year 1876 died. Upon the 29th day of January, A. D. 1875, Sanford B. Dole, Esq., was duly appointed in his place as executor of said will and guardian of said Irene Haalou Ii Brown, and thereupon duly qualified as such executor and guardian and thereafter jointly with said A. F. Judd performed and carried out their said duties as executors and guardians aforesaid continuously until the 13th day of November, A. D. 1886, when the said A. F. Judd and Sanford B. Dole applied to the Court for their discharge as guardians of the said Irene Haalou Ii Brown on the ground that their powers as guardians had ceased to be operative by the marriage of the said Irene Haalou Ii Brown to the said Charles A. Brown upon the 30th day of September, A. D. 1886, a copy of which petition and the order of discharge as guardians aforesaid made pursuant thereto are hereto attached marked respectively Exhibits "B" and "C" and made a part hereof.

6th. That no formal application has ever been made either by the said A. F. Judd or Sanford B. Dole for discharge as executors of said will and as a matter of fact neither the said A. F. Judd or the said Sanford B. Dole have ever been discharged as executors aforesaid.

7th. That the said A. F. Judd upon receiving his appointment [77—22] as executor and guardian as aforesaid also received from the Court at the same time an instrument purporting to be and which said A. F. Judd believed to be a true and correct copy of the said last will and testament of the said John Ii and from which A. F. Judd while acting as executor and guardian as aforesaid exclusively determined and construed his powers and duties under said will, a copy of the instrument delivered to the said A. F. Judd as aforesaid being hereto attached marked Exhibit "D" and made a part hereof.

8th. That in said copy of said will delivered to said A. F. Judd by the Court as aforesaid the following words in the original were omitted: "O laua no na hooko kauohaai ka wa e ola ana kuu kaikamahine a i kana mau keiki," whereby the said A. F. Judd and later his co-executor Sanford B. Dole were not fully advised of the true nature and intent of the said will, the said A. F. Judd and later the said Sanford B. Dole then entertaining the belief and opinion that no trust was created under and by said will that would not terminate whenever the said Irene Haalou Ii Brown attained her majority or married with the consent of her guardians and under such opinion and belief they the said A. F. Judd and Sanford B. Dole filed their petition for discharge as guardians as aforesaid and upon the allowance of said petition delivered over to said Irene Haalou Ii Brown and her husband Charles A. Brown absolutely and unconditionally and as if discharged from every trust or obligation named in said will all of the property de-

vised to the said Irene Haalou Ii Brown by the will aforesaid, and since the date of said discharge as guardians as aforesaid and the delivery of said property as aforesaid to the said Irene Haalou Ii Brown and the said Charles A. Brown neither the said A. F. Judd nor [78—23] the said Sanford B. Dole have exercised any authority or control over said property or attempted in any way whatsoever to execute or perform the terms and conditions of said will and the trusts imposed thereby.

9th. That the said A. F. Judd upon recent consideration of the terms and provisions of said original will has come to the belief and opinion and hereby alleges that by said will the said A. F. Judd and J. Komoikehuchu were made not merely executors of said will and guardians of the person of said Irene Haalou Ii Brown but were also made and constituted trustees under said will and as such trustees were given the right to the possession, control and administration of the entire estate left by decedent, excepting as to specific legacies, during the life of said Irene Haalou Ii Brown whether married or not and that the retention of the control of the said estate by the said estate by the said executors and their successors was imposed as an obligation and duty upon said trustees, which obligation and duty the said A. F. Judd now feels called upon to execute and perform if his present construction of the said will and the terms thereof be found to be correct by this Court, and for that purpose the said A. F. Judd as sole surviving trustee named under said will submits the construction of said will to the adjudication of

this Court and as trustee asks that the same be construed and his duties and obligations as surviving trustee be authoritatively defined.

10th. That since the discharge of the said A. F. Judd as guardian aforesaid the said Charles A. Brown has had possession of the entire estate delivered to the said Irene Haalou Ii Brown and himself, the said Charles A. Brown as aforesaid, and has since the date of taking possession of said estate as aforesaid appropriated and absorbed to his own exclusive use and enjoyment [79—24] all the rents, issues and profits of said estate and has taken upon himself the entire control and management thereof and now claims the personal right to the exclusive use and appropriation of all the rents, issues and profits of the said estate and also the exclusive control and management thereof and contends that under and by virtue of said will no trust was created which survived the marriage of the said Irene Haalou Ii Brown and the discharge of the said guardians aforesaid and under such contention utterly declines and refuses to allow the said A. F. Judd to take possession of said estate or to assume the management and control thereof or otherwise to execute or carry out the trusts imposed upon the trustees named in said will and their successors and he, the said Charles A. Brown, himself utterly refuses to carry out said trusts or to pay over the income from said estate or any part thereof to his said wife, and the said Charles A. Brown further refuses and declines to account to the said A. F. Judd or to anyone for the rents, issues and profits of the said estate or for his management

and control thereof from the date of his taking possession of the same to the present time or for any time whatsoever, and your complainants allege that the said Charles A. Brown since assuming the control and management of said estate has wasted, squandered and mismanaged the same and incurred large liabilities which he illegally seeks to make a charge upon the said estate.

11th. That the said Charles A. Brown at the time of his marriage with the said Irene Haalou Ii Brown and at the time of taking possession and control of said estate had full knowledge of the contents of said will and of all and singular the matters hereinabove set forth. [80—25]

12th. That the said Charles A. Brown at the present time and for some time past has failed to make adequate or proper provision for his said wife Irene Haalou Ii Brown and has utterly failed since his marriage with said Irene Haalou Ii Brown to make any settlement upon her nor has she any means whatsoever of support except from the said estate which is being used, absorbed and squandered by the said Charles A. Brown as aforesaid, and the said Charles A. Brown now utterly refuses to make any settlement upon his said wife, Irene Haalou Ii Brown, out of said estate though often thereto requested by the complainants herein, and your complainants fear that unless the said Charles A. Brown is restrained by this Court he will further waste and squander said estate and thereby prevent the execution of the trusts imposed by said will and that otherwise the action of the said Charles A. Brown will result in irrepara-

ble injury to said estate and the several rights of complainants herein.

13th. That the said Irene Haalou Ii Brown is desirous of having this Court set apart a reasonable allowance for her out of the income of said estate sufficient to support herself and her two minor children, to wit, the said George Ii Brown, aged six and one-half years, and the said Francis Hyde Ii Brown, aged about six months, being the children born to the said Irene Haalou Ii Brown in wedlock by her marriage with the said Charles A. Brown.

14th. That under and by said will provision was made for the children of said Irene Haalou Ii Brown and also for the support of said Irene Haalou Ii Brown and it is important to obtain a construction of such provisions and the relative rights under said will of such minor children and the said Irene Haalou Ii Brown and the said Charles A. Brown in and to the said estate, and [81—26] to the income thereof, and to that end your complainants pray that this Court do construe and determine the relative rights aforesaid of said children and said Irene Haalou Ii Brown and her husband in and to said estate under said will.

Wherefore complainants pray:

1st. That the said Charles A. Brown be duly summoned to appear and answer this complaint.

2nd. That the terms and provisions of said will and the duties and obligations imposed thereunder upon the said A. F. Judd as aforesaid to be defined and determined.

3rd. That the Court by appropriate decree made

adequate provision for the support of the said Irene Haalou Ii Brown and her said children out of the income of said estate, and that if the contention of your petitioners regarding the true intent and meaning of said will be found to be correct and that there remain certain trusts created under said will yet to be performed that the Court do thereupon declare and execute such trusts, and to that end that the said Charles A. Brown be called upon to account to this Court for all the rents, issues and profits received by him from said estate since his taking possession of the same as aforesaid and for his management and control thereof and that the said Charles A. Brown be declared to hold said estate in trust for the uses and purposes named in said will and that the said A. F. Judd be reinstated as trustee and that the said C. A. Brown be ordered to deliver over the possession, control and management of said estate to the said A. F. Judd and for costs and such other and further relief as to the Court seems meet.

A. F. JUDD,

CARTER & CARTER,

W. A. KINNEY,

Attorneys for Plaintiffs. [82—27]

Hawaiian Islands,

Honolulu, Oahu,—ss.

A. F. Judd being duly sworn deposes and says that the allegations in the foregoing petition are true except as to those things alleged on information and belief and those he *believe* to be true.

A. F. JUDD.

Subscribed and sworn to before me this 7th day of April, A. D. 1894.

CHARLES F. PETERSON,

Clerk Circuit Court, First Circuit. [83--28]

Imua o ke Akua mana loa Amene. O wau o Ioane Ii no ke Kulanakauhale Honolulu Mokupuni Oahu ko Hawaii Pae Aina, ua hana au, a ke hana nei i kaio palapala kauoha hooilina, i mea e hoike aku ai ma ke Akea, no ka mea, o kaio kauhoa hope loa keia. A ma hope o ka hookaa ano i ko'u mau aie a pau, e ili aku no kuu mau waiwai paa a pau loa, a me ko'u mau waiwai ia malolo penei:

Akahi. O Airene Haalou Ii kuu kaikamahine pono i ka hooilina mua penei:

O ka aina o Halaape Kohala Mokupuni o Hawaii
 Waipunaula i ki Kona Hema ..

Aina hoolina Heneriaka Kaleemakalii o Aleemai Hana

Mokupuni o Maui

Elua apana aina Kapunakea Lahaina ..

Akahi Loi i loko o Uhao

.. Ahupuaa o Keopukapaiole i Molokai

Ma ka Mokupuni Oahu.

Hookahi Ili aina i loko o Makiki o Kaneialole ke kumu ia o ka wai, a hiki i kai o Pawaii.

Akahi Pa Hale i Kamakela Honolulu.

.. Kuleana i Waiakemi ..

.. .. Paakiko Maemae ..

.. Ahupuaa o Waipo i Ewa a me

.. Kuleana no Kekela (w) i make a ua lilo iau aia ma Kee Haena Mokupuni o Kauai a me ka hapalua o na waiwai Lewa Apau.

Elua. O kuu wahine mare o Maraea Ii ka lua o ka hooilina. Akahi aina ma Hilo oia ka kuleana o Lumaina i lilo ia'u ma ke kuai. Hookahi Ili aina o Makana i Koolauloa Oahu, a me ka hapalua o na waiwai Lewa Apau. A ina mare oia i ke kane hoi hou no keia mau aina no kuu kaikamahine, aole hiki iaia ke hooili aku ia hai. [84—29]

Ekolu. O kuu kaikaina o J. Komoikehuehu ke kolu o na hooilina. Akahi Ili aina o Homaikaia i loko o Waipio, me akahi aina kuai o ka hapalua o Auiole i Waikele Ewa Oahu. A me akahi Ili aina o Kaluapule Kalihi Oahu, oia kona mau aina aio e hooili nei.

Eha. O ko'u kuleana i loko o ka aina o G. Naaihelu kuu kaikaina i make e pili no ia i kana waihane ia Kamealani.

Elima. O kuu aina kuai oia ka Pa i Pawaa e pili na no me ka pa o Kauka ma ka aoao ma Waikiki o ke alanui Aupuni e holo ea i Waikiki kai no A. F. Judd ia Pa oia kona aina a'u e hooili nei.

Ma keia palapala kauoha a'u ua hoonohe aku au, a ke hoonohe nei ia J. Komoikehuehu A. F. Judd, o laua elua no hooko kauoha o'u, a mau luna Hooponopono waiwai, a he mau kahu no ke kino, a me ka waiwai o kuu kaikamahine, ka hooilina mua i hoike ia ma keia palapala, no na loa a pau o na aina i hoolimalima ia, a me na loa e ae maluna o na aina a pau o kuu kaikamahine, me laua wale no ka malama a hiki i Kona wa e kanaka makua ai, a hanau paha kana mau keiki, (o laua no na hooko kauoha i ka wa e ola ana kuu kaikamahine, a i kana mau keiki) aku, e like me kuu makeia ako i hoike ia ma keia palapala,

a e loa no ia laua ka uku elike me ke kanawai.

A na o'u mau hooko kauoha e hoonoho i kuu kaikamahine ma kahi kupo e ao ia i ka naauao ma na olelo elua, a e alakai ia ka'u keiki ma ke alanui o ka pono, a o na hua mua e loa mai ana mai ka aina mai, o ke kaikamahine oia na dala loa mai, e lawe ia he Umi keneta no kela keia dala apau a he dala hoolaa ia no ko ke Akua Aupuni; e like me ka'u mau hana ana, a e hooko i keia na hooko kauoha o'u.

Eia hoi ina make kuu kaikamahine, a ua hanau keiki oia, alaila e ili aku no ka waiwai i kana mau keiki, a ina ua make me ke keiki ole, alaila e ili oku no i Kona makuahine pono i a ina e make ia e [85—30] ili hou aku i kuu kaikaina ia J. Komoikehuehu.

I hoike no ka oiaio o keia ke kakau nei au i kuu inoa me kuu lima iho, a hoo hoopili mai i ko'u sila i keia la 28 Aperila M. H. 1870.

Koo

IOANE II X

uha

Ma muli o ke noi ana mai a ka mea Hanohano Ioane Ii, i a makau i mau hoike no kona kakau inoa ana i kana palapala kauoha hope loa, a ua kakau makau i ko ma. Kou mau inoa i mua ona.

D. B. MAHOE. no Honolulu.

D. KAHANUE no Honolulu.

W. L. MOEHONUA no Honolulu.

(For translation, see page 4, [Printed Record, page 61].) [86—31]

Supreme Court of the Hawaiian Islands.

IN PROBATE.

In re Guardianship of IRENE H. II.

To the Honorable Lawrence McCully, Justice of the Supreme Court:

The petition of A. F. Judd and S. B. Dole of Honolulu respectfully represents, that by the will of the late Hon. John Ii duly admitted to Probate in this Court on the 13th day of June, A. D. 1870, the aforesaid A. F. Judd was appointed as guardian of Irene Haalou Ii the daughter and devisee of the said testator and one J. Komoikehuehu was also appointed Guardian under the said will; that they both qualified to act as such guardians and continued so to act until the said J. Komoikehuehu resigned and S. B. Dole aforesaid was appointed by a Justice of the Supreme Court in his place; that the said A. F. Judd and S. B. Dole filed an inventory of the property of their said ward, and they have collected the income of the estate and disbursed or invested the same rendering annually to the Supreme Court an account thereof, which have been duly allowed and approved; that they have done all things required of them by the statutes or orders of this Court or which prudent and faithful guardians ought to do and have complied with the directions of the will of the testator concerning the management of the estate and the care, education and custody of the minor devisee.

That their said ward, Irene H. Ii, on the 30th of September, 1886, was united in marriage with one Charles Augustus Brown with their consent and

these petitioners respectfully submit that by the statutes of this Kingdom this marriage operates as a discharge [87—32] of the Guardianship.

That they present herewith, on Schedules A, B and C, and made a part of this petition a full and correct account of all their receipts and disbursements since their last annual account.

Wherefore, they pray that on a day appointed for a hearing of this petition their accounts may be examined and entered and that they may be discharged from all further responsibility as such guardians and that their bond may be ordered to be cancelled and their sureties thereto released from further obligation.

And your petitioners will ever pray, etc.

A. F. JUDD.

S. B. DOLE.

Oahu,—ss.

A. F. Judd, one of the petitioners above named, being duly sworn, deposes and says that the foregoing petition is true to the best of his knowledge and belief.

A. F. JUDD.

Sworn and subscribed to this second day of October, A. D. 1886.

HENRY SMITH,
Deputy Clerk. [88—33]

Supreme Court of the Hawaiian Islands.

IN PROBATE.

At Chambers, Before PRESTON, J.

In the Matter of the Estate of IRENE H. II, a
Minor.

Whereas, A. F. Judd and S. B. Dole of Honolulu, Oahu, Guardians of Irene H. Ii, minor, did, on the 4th day of October, A. D. 1886, file in this court their petition showing that they were by this court appointed guardians of the estate of said Irene H. Ii; that they were duly qualified to act as such guardians by filing an approval bond and taking out letters of Gndshp. That they filed in this court their sworn inventory of all the assets of said Estate to them known; that they have collected all sums by them known or believed to be due to the said Estate which can be collected; that as such guardians they have done all things required of them by the statutes, or the Orders of this Court, or which prudent and faithful guardians ought to do; That they present on Schedules A, B and C, annexed to said petition, and made a part thereof, an account of all their receipts and expenditures, also, of all property remaining in their hands, belonging to the said Estate, and praying that said accounts may be examined and approved; that they and also their sureties, may be discharged from all further responsibilities concerning the said Estate, and that a final order of distribution may be made of the property remaining in their possession to the persons thereto entitled; Order to show cause was made returnable on Satur-

day, the 13th day of November, A. D. 1886, at 10 o'clock A. M., before Justice McCully, at Chambers, in the Courthouse at Honolulu; and it was further ordered that said order be published in the English and Hawaiian languages in the Hawaiian Gazette and Kuokoa newspapers printed and [89—34] published in Honolulu, for three successive weeks previous to the time therein appointed for said hearing.

And at the time and place named in said Order, on affidavit of its publication as prescribed in the terms thereof;

Due proof was made that the said A. F. Judd and S. B. Dole had done all the said things by them alleged to have been done as required by the Statutes or by the Orders of Court, and that the said account and vouchers were correct. And it further appeared upon examination that all the property of said estate, inventoried, is fully accounted for by the said A. F. Judd and S. B. Dole.

Now, therefore, it is ordered and adjudged by the Court here, that the said accounts of the said A. F. Judd and S. B. Dole be allowed, and that they are discharged from all further responsibility as such guardians, that their bond be cancelled, and the sureties thereto released from further obligation. And that, the said A. F. Judd and S. B. Dole do deliver over the property remaining in their hands to the person hereinafter named, and do file with this Court, a proper receipt therefor, and that this order be issued and take effect from the date of the filing of said receipt.

The person entitled to the estate is as follows, with the respective places of residence, age and sex: Irene Haalou Ii, now the wife of Charles A. Brown, both of Honolulu, but now visiting in the United States.

Done in open Court, this thirteenth day of November, A. D. 1886.

EDWARD PRESTON,

Justice of the Supreme Court.

Attest: HENRY SMITH,

Deputy Clerk of the Supreme Court. [90—35]

Imua o ke Akua mana loa Amene. Owau o Ioane Ii no ke Kulana kauhale Honolulu Mokupuni Oahu ko Hawaii Pae Aina, ua hana au, a ke hana nei i kau palapala kauoha hooilina, i mea e hoike aku ai ma ke akea, no ka mea, o ka'u kauoha hope loa keia. A mahope o ka hokaa ana i ko'u mau aie a pau, E ili aku no kou mau waiwai paa a pau loa a me ko'u mau waiwai Lewa o pau loa i kuu hooilina i hoike ia malalo nei penei.

Akahi: O Airine Haalou Ii kuu kaikamahine ponoi ka hooilina ponoi ka hooilina mua penei:

O ka aina o Halaape Kohala Mokupuni o Hawaii

O kaaina o Waipunaula iki Kona Hema Hawaii

Aina hollina o Heneriaka Kaleemakalii o Aleemai:

Hana Mokupuni o Maui.

Elua apana Aina Kapunakea Lahina Maui

Akahi Loi i loko o Ahao Lahaina Maui

Akahi Ahupuaa o Keopukapaiole o Molokai ma ka Mokupuni Oahu

Hookahi Ili aina i loko o Makiki o Kancialole ke kumu ia ka wai a hiki o kai o Pawaa

Akahi Pa Hale o Kamakela Honolulu.

“ Kuleana i Waiakenii “

“ “ Paakiko Maemae “

“ Ahupuaa o Waipio i Ewa a me

“ Kuleana no Kekela (w) i make a ua lilo ia u

Aia ma kee Haena Mokupuni o Kauai a me ka hapalua o no waiwai Lewa Apau.

Elua O kuu wahine mare o Maraea Ii ka leia o ka hooilina, Akahi aina ma Hilo oia ke Kuleana o Lumaina i lilo iau ma ke kuai. Hookahi Hi aina o Makana i Koolauloa Oahu a me ka hapalua o na waiwai Lewa a pau a ina mare oia i ke kane hoi hou no keia mau Aina no kuu kaikaimahine, aole hiki iaia ke hooili aku ia hai

Ekuolu O kuu kaikaina o J. Komoikehuehu ke Kalu o no hoolina [91—36] Akahi ili aina o Homaikaia iloko o Waipio, me Akahi Aina kaui o ka hapalua o Aniole o Waikele Ewa Oahu a me Akahi Ili aina o Kaluapulu Kalihi Oahu oia Kona mau aina aie e hooilinei,

Eha O ko'u kuleana i loko o ka aina o G. Naaihelu kuu kaikaina i make e pili no ia i kana wahine ia Kamealawi

Elima O kuu aina kuai oia ka Pa i Pawaa e pili la no me ka pa o Kauka ma ka aoao ma Waikiki o ke alanui Aupuni e holo la i Waikiki kai no A. F. Judd ia Pa oia Kona aina a'u e hooili nei:

Ma keia palapala kauoha a'u ua, hoonoho aku au, a ke hoonoho nei ia J. Komoikehuehu A. F. Judd, o laua elua no hooko kauoha o'u a mau Luna Hooponopono waiwai, a he mau kahu no ke kino, a me ka waiwai o kuu kaikamahine, ka hooilina mau i hoike

ia ma keia palapala, a na loa a pau o na Aina i hoolimalima ia, a me na loa e ae maluna o na Aina a pau o kuu kaikamahine, me laua wale no ka malama a hiki i kona na e kanaka makua ai, a hanau paha kana mau keiki aku, E like me kuu makemake [heia] i hoike ia ma jeia palapala, a e loa no ia laua ka aku Elike me ka kanawai

A na o'u mau hooko kauoha e hoonoho i kuu kaikamahine ma kahi kupono e ao ia ika naauao ma na olelo Elua, a e alakai ia ka'u keiki ma ka Alanui o ka pono a o ma hua mau e loa mai ana mai ka aina mai o ke kaikamahine oia na dala loa mai; e lawe ia he Umi keneka no kela keia dala apau a he dala hoolaa ia no ko ke Akua Aupuni: Elike me ka'u mau hana ana, a e hooko o keia no hooko kauoha o'u

Eia hoe ina make kuu kaikamahine, a ua hanau keiki oia, alaila e ili aku no ka waiwai i kana mau keiki, a ina ua make me ke keiki ole, Alaila e ili aku no i Kona makuahine pono i ina e make ia e ili hou aku i kuu kaikaina ia J. Komoekehuehu

I hoike no ka oiaio o keia ke kakau nei au i kuu inoa me kuu lima iho, a hoo hoopili mai i ko'u Sila i keia la 28 Aperila [92—37] M. H. 1870.

kona

IOANE II X

kaha

Mamuli o ke noi ana mai a ka mea Hanohano Ioane Ii, ia makou i mau hoike ne Kona kakau inoa

ana i kana palapala Kauoha hope loa, a ua kākau
makou mau inoa i
mua ona

(Signed)	D. B. MAHOE	no Honolulu.
"	D. KAHANU	" "
"	W. L. MOEHONUA	" "

I hereby certify that the above is a true and correct copy of the last will and Testament of John Ii of Honolulu with certificate of Probate on the same attached hereunto.

As witness my hand and the seal of the Supreme Court this 13th day of June, A. D. 1870.

WALTER R. SEAL,
Deputy Clerk.

(For translation see page 4, [Printed Record, page 61].) [93—38]

In the Circuit Court of the First Circuit, Hawaiian Islands.

IN EQUITY.

IRENE HAALOU II BROWN, a Married Woman,
and GEORGE II BROWN and FRANCIS
HYDE II BROWN, Minors, by Their Next
Friend A. F. JUDD, and A. F. JUDD

vs.

CHARLES A. BROWN.

**Prayer for Leave to Prosecute and Order Thereon.
BILL TO DECLARE AND EXECUTE A TRUST
AND FOR AN ACCOUNTING.**

Now comes A. F. Judd and prays the Court for leave to exhibit a bill on behalf of Irene Haalou Ii Brown, a married woman, and George Ii Brown and

Francis Hyde Ii Brown, minors, as their Next friend against Charles A. Brown for construction of the will of John Ii, deceased, and other relief, filing herewith his affidavit and that of said Irene Hualou Ii Brown in support of the same.

Dated at Honolulu this 7th day of April, A. D. 1894.

A. F. JUDD.

ORDER.

The prayer is granted.

HENRY E. COOPER,

Second Judge of the Circuit Court of the First Circuit. [94—39]

In the Circuit Court of the First Circuit, Hawaiian Islands.

IN EQUITY.

IRENE HAALOU II BROWN, a Married Woman,
and GEORGE II BROWN and FRANCIS
HYDE II BROWN, Minors, by Their Next
Friend A. F. JUDD, and A. F. JUDD

vs.

CHARLES A. BROWN.

Affidavit of Irene Haalou Ii Brown.

**BILL TO DECLARE AND EXECUTE A TRUST
AND FOR AN ACCOUNTING.**

Hawaiian Islands,

Honolulu, Oahu,—ss.

Irene Haalou Ii Brown, being duly sworn, deposes and says; that she has requested A. F. Judd to institute the cause above-entitled on her behalf as her next friend.

IRENE H. II BROWN.

Subscribed and sworn to before me this 7th day of April, A. D. 1894.

CHARLES F. PETERSON,

Clerk, Circuit Court, First Circuit. [95—40]

In the Circuit Court of the First Circuit, Hawaiian Islands.

IN EQUITY.

IRENE HAALOU II BROWN, a Married Woman,
and GEORGE II BROWN and FRANCIS
HYDE II BROWN, Minors, by Their Next
Friend A. F. JUDD, and A. F. JUDD

vs.

CHARLES A. BROWN.

Affidavit of A. F. Judd.

**BILL TO DECLARE AND EXECUTE A TRUST
AND FOR AN ACCOUNTING.**

Hawaiian Islands,

Honolulu, Oahu,—ss.

A. F. Judd, being duly sworn, deposes and says that he was for sixteen years guardian of Irene Haalou Ii Brown, a married woman, and is her next friend and of George Ii Brown and Francis Hyde Ii Brown, her minor children; that they have good and sufficient grounds for relief against Charles A. Brown referred to above upon which to bring the petition herein, and that he is ready and willing to pay all costs that may be incurred in a suit to establish their rights in case he is defeated therein.

A. F. JUDD.

Subscribed and sworn to before me this 7th day of April, A. D. 1894.

CHARLES F. PETERSON,

Clerk, Circuit Court, First Circuit.

Filed April 7th, 1894, Henry Smith, Clerk.

[Endorsed]: Received \$37.00. [96—41]

In the Circuit Court of the First Circuit, Hawaiian Islands.

At Chambers—IN EQUITY.

(\$2.00 Stamps.)

IRENE H. II BROWN, et al., by Their Next Friend,
A. F. JUDD

vs.

C. A. BROWN.

Summons.

IN THE NAME OF THE PROVISIONAL GOVERNMENT OF THE HAWAIIAN ISLANDS:

To the Marshall of the Hawaiian Islands or his Deputy, Greeting:

You are hereby commanded to summon C. A. BROWN, to appear ten days after service hereof, if he resides on the Island of Oahu otherwise twenty days after service, before such Judge of the Circuit Court of the First Circuit as shall be sitting at Chambers in the courtroom at Honolulu to answer the annexed petition, of Irene H. Ii Brown et al. by their next friend A. F. Judd and A. F. Judd.

And you are further commanded by order of Hon. _____, Judge of the Circuit Court of the _____ Circuit. And have you then there this writ with your returns thereon.

Witness the First Judge of the Circuit Court of the First Circuit, at Honolulu this 7th day of April, 1894.

[Seal]

HENRY SMITH,
Clerk. [97—42]

Sec. 1166, Civil Code: "The time within which an act is to be done * * * shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded."

[Endorsed]: No. 781. Equity Division. Docket 9/460. Circuit Court First Circuit. Irene H. Ii Brown et al, by their next friend A. F. Judd, vs. Chas. A. Brown. Chambers Summons. Issued April 7, 1894 at 3.00 o'clock P. M. Returned by the Marshall April 16, 1894. G. Lucas, Clerk.

——— Service — at \$1.00 each, \$———

——— Cop. ——— at \$1.00 each, ———

Expense —————

Total \$———

Served this summons as follows: On Charles A. Brown in Honolulu this 10th day of April, 1894, at 10:50 A. M. by delivering a certified copy thereof, and of the petition and complaint annexed to Charles A. Brown.

Dated Honolulu, April 10, 1894.

D. KAAPA,
Police officer. [98—43]

In the Circuit Court of the First Circuit, Hawaiian Islands.

IRENE HAALOU II BROWN, a Married Woman,
and GEORGE II BROWN and FRANCIS
HYDE II BROWN, Minors, by Their Next
Friend A. F. JUDD, and A. F. JUDD

vs.

CHARLES A. BROWN.

Discontinuance of Irene Haalou Ii Brown.

BILL TO DECLARE AND EXECUTE A TRUST
AND FOR AN ACCOUNTING.

Now comes Irene Haalou Ii Brown, one of the
plaintiffs in the above-entitled matter, and discon-
tinues all further proceedings therein.

IRENE HAALOU II BROWN.

Dated Honolulu, April 20th, 1894.

[Endorsed]: Circuit Court 1st Circuit. In Equity.
Irene H. Ii Brown, et al., vs. Chas. A. Brown. Dis-
continuance. I. H. I. Brown. Received \$
Filed Apr. 21, 1894. Geo. Lucas, Clerk. [99—44]

In the Circuit of the 1st Circuit.

IRENE H. I. BROWN et al.,
C. A. BROWN.

Special Appearance.

Now comes C. A. Brown, defendant in the above-
entitled matter and appears specially for the pur-
pose of asking the Court to dismiss the bill of plain-
tiffs therein, inasmuch as Irene H. I. Brown has this

day filed her discontinuance in said suit.

C. A. BROWN,
By His Attorneys,
F. M. HATCH and
J. ALFRED MAGOON.

[Endorsed]: Circuit Court, 1st Circuit. Irene H. I. Brown et al. vs. C. A. Brown. Special Appearance C. A. Brown. Filed April 21, 1894. Henry Smith, Clerk. F. M. Hatch & J. A. Magoon, Attys. for Defendant. [100—45]

In the Circuit Court of the First Circuit, Hawaiian Islands.

IN EQUITY.

IRENE HAALOU II BROWN, a Married Woman,
and GEORGE II BROWN and FRANCES
HYDE II BROWN, Minors, by Their Next
Friend, A. F. JUDD and A. F. JUDD

vs.

CHARLES A. BROWN.

Motion for Hearing.

BILL TO DECLARE AND EXECUTE A TRUST
AND FOR AN ACCOUNTING.

Comes now the plaintiffs by their attorneys, W. A. Kinney and Carter & Carter, and show that a reasonable time has elapsed since the order of the Court whereby permission was given the defendant to bring in an amended motion to dismiss the bill so far as Mrs. C. A. Brown is concerned, and that nothing has been done to that end, and no answer made and moves that the said cause be set down for

hearing on the bill forthwith.

This motion is based upon the record.

Honolulu, June 28th, 1894.

W. A. KINNEY,
CARTER & CARTER,

Attorneys for Plaintiffs.

To F. M. Hatch and J. A. Magoon, Attorneys for
Defendant.

Please take notice that the foregoing motion was
filed this day and that the same will be called up to-
morrow (Friday) morning at 10 o'clock A. M., and
a day fixed for hearing said [101—46] cause in
accordance therewith.

W. A. KINNEY,
CARTER & CARTER,

Attorneys for Plaintiffs.

[Endorsed]: Circuit Court, First Circuit. In
Equity. A. F. Judd et al. vs. C. A. Brown. Motion
for Hearing. Received \$. Filed Jun. 28,
1894. Geo. Lucas, Clerk. [102—47]

Circuit Court, First Circuit, Hawaiian Islands.

IN EQUITY.

JUDD et al.

vs.

C. A. BROWN.

**Motion That Irene Ii Brown be not Allowed to
Change Her Status.**

Come now W. A. Kinney and Carter & Carter,
attorneys for plaintiffs, and move that the plaintiff,
Irene Ii Brown, be not allowed to change her status
in said cause nor her attorneys, until the annexed

104 *The John Ii Estate, Limited, et al.*

account due to them be paid in full.

This motion is based on the affidavits filed herewith and the record.

Honolulu, July 9th, 1894.

CARTER & CARTER. [103—48]

Account for Professional Services.

Honolulu, July 10, 1894.

Mrs. Irene Ii Brown

To W. A. Kinney and Carter & Carter, Dr.

For professional services as follows:

Examining Probate Records in Estate
of John Ii and Sixteen Annual Ac-
counts of Her Guardians:

Investigation of authorities upon the
many intricate questions involved and
reporting upon the same:

Examining records in the office of the
Registrar of Conveyances for various
leases, mortgages and other conveyances
by herself or her husband, the defend-
ant:

Various interviews, consultations and
conferences with herself and A. F.
Judd, her next friend:

Preparation of Pleadings and filing the
same:

\$250.00

[104—48a]

Circuit Court, First Circuit, Hawaiian Islands.
IN EQUITY.

JUDD et al.

vs.

C. A. BROWN.

Affidavit of A. F. Judd.

Hawaiian Islands,
Honolulu, Oahu,—ss.

A. F. Judd, being duly sworn, deposes and says that he was requested by Irene Ii Brown to institute these proceedings on behalf of her and her children, that on the 20th day of April, A. D. 1894, at 12:30 P. M. he received the following note from the hand of J. A. Magoon, Esq.:

Honolulu, Oahu, April 19, 1894.

Hon. A. F. Judd,
Honolulu, Oahu.

Dear Sir,

I hereby revoke the authority which I gave you to bring a Bill in Equity against my husband in regard to the construction of my father's will and the possession of my estate, and I desire you to discontinue said suit.

Sincerely yours,

IRENE II BROWN.

That the envelope in which the same was enclosed as well as the note, excepting only the signature thereto, were in the handwriting of C. A. Brown, the defendant.

That he took the note immediately to the office of

Carter & Carter, attorneys for Mrs. Irene Ii Brown, and before anything had been done, the next morning a motion to discontinue was filed and he therefore took no farther steps in the premises. That he retained [105—49] W. A. Kinney as attorney in the said matter.

A. F. JUDD.

Subscribed and sworn to before me this —— day of July, A. D. 1894.

CHARLES F. PETERSON,

Clerk [106—50]

Circuit Court, First Circuit, Hawaiian Islands.

IN EQUITY.

JUDD et al.

vs.

C. A. BROWN.

Affidavit of C. L. Carter.

Hawaiian Islands,
Honolulu, Oahu,—ss.

Charles L. Carter, being duly sworn, deposes and says that he is one of the partners of the firm of Carter & Carter, attorneys at law; that on or about the first day of March, A. D. 1894, having been theretofore retained by Irene Ii Brown generally to protect her interests in the matter of her father's estate, in consultation with her in his office, she instructed and directed the institution of these proceedings; that she offered to pay the fee of the said firm, but that upon her statement of the sum of money then at her disposal, the exact amount of which affiant does

not now recollect, further than the amount was less than \$100, affiant advised and informed her that the amount was too small, and that it would be as well to wait, but that she might advance the costs, which she then and there did.

That on the day of the filing of the petition this affiant met the said Irene Ii Brown in the office of A. F. Judd in the Judiciary Building, that she read all the pleadings in the presence of affiant and A. F. Judd; that the latter asked her if she approved, [107—51] and if she wished him to proceed on her behalf, she replied that she did, whereupon she signed and swore to her affidavit attached to the summons. That since that day affiant has not had any interview with her, nor any direction, excepting that after filing and before service she made a request by telephone that service be delayed owing to the illness of her child, which was done.

CHARLES L. CARTER.

Subscribed and sworn to before me this 10th day of July, A. D. 1894.

GEORGE LUCAS,

Clerk. [108—52]

Circuit Court, First Circuit, Hawaiian Islands.

IN EQUITY.

JUDD et al.

vs.

C. A. BROWN.

Affidavit of A. W. Carter.

Hawaiian Islands,
Honolulu, Oahu,—ss.

A. W. Carter, being duly sworn, deposes and says that he is one of the partners in the firm of Carter & Carter, attorneys at law; that prior to March 1st, 1894, Irene Ii Brown retained the said firm to proceed with the enforcement of all rights against her husband on behalf of herself and her children with relation to the estate left by her father, and to do all things and take all steps necessary to that end upon consultation with her friend, A. F. Judd. That on that day she paid the amount of \$37 to him to be deposited for costs in these proceedings which were instituted shortly after. That at the time she paid the costs she offered to pay for the legal services of the said firm, but that she did not pay the same, and has not since paid the same or any part thereof.

ALFRED W. CARTER.

Subscribed and sworn to before me this 10th day of July, A. D. 1894.

GEO. LUCAS,
Clerk.

[Endorsed]: Circuit Court, First Circuit. A. F. Judd et al. vs. C. A. Brown. Motion. Filed July 10, 1894. Geo. Lucas, Clerk. [109—53]

Circuit Court, First Circuit.

A. F. JUDD, Next Friend, etc.,

vs.

C. A. BROWN et al.

**Exception of Plaintiff to Discontinuance of Irene
H. Ii Brown.**

The Court ruling that the plaintiff Irene H. Brown may discontinue without paying any obligations incurred by her next friend in her behalf excepting the actual costs of court and expressly ruling that the Court has no power or authority to make payment of obligations incurred by next friend for attorney's fees in behalf of Mrs. Brown a condition upon which the Court will allow a discontinuance.

Plaintiff excepts and his exception is allowed.

HENRY E. COOPER.

Wish to be heard. (Sgd.) F. M. H.

[Endorsed]: Circuit Court, First Circuit. A. F. Judd next friend vs. C. A. Brown et al. Exception. Filed July 11, 1894. Henry Smith, Clerk. [110—54]

*In the Circuit Court of the First Circuit, Island of
Oahu, Hawaiian Islands.*

IN EQUITY.

IRENE HAALOU II BROWN, a Married Woman,
and GEORGE II BROWN and FRANCIS
HYDE II BROWN, Minors, by Their Next
Friend, A. F. JUDD, and A. F. JUDD

vs.

CHARLES H. BROWN.

Amended Discontinuance of Irene H. I. Brown.

**BILL TO DECLARE AND EXECUTE A TRUST
AND FOR AN ACCOUNTING.**

Now comes Irene H. I. Brown, one of the plaintiffs in the above-entitled matter, by her attorneys, and shows to the Court that on the 19th day of April, 1894, she sent to Hon. A. F. Judd a letter requesting him to discontinue proceedings in said cause, of which a copy is set forth in affidavit of J. Alfred Magoon hereto attached and made a part hereof; that said Hon. A. F. Judd disregarded the instructions contained in said letter,

WHEREFORE, this plaintiff asks leave of the Court to discontinue all further proceedings in said cause and that her name be stricken from said complaint.

IRENE H. I. BROWN,
By Her Attorneys,
F. M. HATCH and
J. ALFRED MAGOON.

Dated Honolulu, June 29th, 1894. [111—55]

Island of Oahu, Hawaiian Islands.

IN EQUITY.

IRENE HAALOU II BROWN, a Married Woman,
and GEORGE II BROWN and FRANCIS
HYDE II BROWN, Minors, by Their Next
Friend A. F. JUDD, and A. F. JUDD

vs.

CHARLES A. BROWN.

Affidavit of J. A. Magoon.

**BILL TO DECLARE AND EXECUTE A TRUST
AND FOR AN ACCOUNTING.**

Now comes J. A. Magoon and on oath deposes and says that he is one of the attorneys for Irene Haalou Ii Brown in the above-entitled matter, and that as such attorney he delivered personally to the Hon. A. F. Judd, also plaintiff therein, on the — day of April, 1894, a letter, of which the following is substantially a copy:

Hon. A. F. Judd,

Honolulu, Oahu.

Dear Sir:

I hereby revoke the authority which I gave to you to bring a Bill in Equity against my husband in regard to the construction of my father's Will and the possession of my estate, and I desire you to discontinue said suit.

Sincerely yours,

IRENE H. I. BROWN.

—and thereafter, to wit, on the 21st day of said month, said A. F. Judd failing and refusing to comply with the request in said letter said Irene Haalou Ii Brown filed her discontinuance in said suit.

J. ALFRED MAGOON.

Subscribed and sworn to before me this 11th day of July, 1894.

GEO. LUCAS,
Clerk.

It is hereby allowed I. H. I. Brown to substitute the above affidavit for affidavit of J. A. Magoon filed June 29th, /94, which may be withdrawn.

CARTER & CARTER,
Attys. for Plaintiffs.

[Endorsed]: Circuit Court, First Circuit. Irene H. I. Brown et al. vs. C. A. Brown. Affidavit of J. A. Magoon. Filed July 11, 1894. Geo. Lucas, Clerk.
[112—56]

Circuit Court, First Circuit, Hawaiian Islands.

IN EQUITY.

Before COOPER, Judge, at Chambers.

IRENE HAALOU II BROWN et al., by Their Next
Friend, A. F. JUDD, and A. F. JUDD

vs.

C. A. BROWN.

Order on Motion for Leave to Discontinue.

On the motion of Irene Haalou Ii Brown, by her attorneys, J. A. Magoon and F. M. Hatch, for leave to discontinue the said proceedings, and the objections thereto having been made by and on behalf of the next friend heard and considered.

It is ORDERED that the next friend discontinue as to the said Irene Haalou Ii Brown as and from the following of this order and that the other plaintiffs within five days file an amended bill in accordance with such discontinuance.

Dated at Honolulu, July —, A. D. 1894.

[Endorsed]: Circuit Court, First Circuit. In Equity. Judd vs. Brown. Order on Motion for

Leave to Discontinue. Received \$. Filed July
17, 1894. Geo. Lucas, Clerk. [113—57]

Circuit Court, First Circuit, Hawaiian Islands.

IN EQUITY.

Before COOPER, Judge at Chambers.

JUDD et al.

vs.

BROWN.

**Motion That No Order of Discontinuance be
Made, etc.**

MOTION FOR ATTORNEYS TO DISPLAY
AUTHORIZATION.

Come now W. A. Kinney and Carter & Carter, attorneys for the plaintiffs in said cause, and move that no order of discontinuance be made and that F. M. Hatch, Esq., and J. A. Magoon, Esq., exhibit to the Court their authority, if any, for appearing herein as the attorneys for Mrs. Irene Ii Brown.

This motion is based upon the record and the affidavit of Charles L. Carter filed herewith.

Honolulu, July 23, 1894.

W. A. KINNEY,
CARTER & CARTER,
Attys. for Plaintiffs. [114—58]

Circuit Court, First Circuit, Hawaiian Islands.

IN EQUITY.

Before COOPER, Judge, at Chambers.

JUDD

vs.

BROWN.

Affidavit of Charles L. Carter.

Hawaiian Islands,
Honolulu, Oahu,—ss.

Charles L. Carter, being duly sworn, deposes and says that on or about Saturday the 14th inst. he had an interview with Dr. C. M. Hyde, one of the confidential friends of Mrs. Irene Ii Brown, as a consequence of which affiant had an interview with J. A. Magoon, Esq., on or about Monday the 16th inst., at which the said J. A. Magoon, Esq., declared and said that he sent the "amended motion for leave to discontinue" to Mrs. Irene Ii Brown for her signature, and that she refused to sign the same, or to authorize any further proceedings looking towards a discontinuance on her behalf, whereupon he signed and filed the same, claiming to act as her attorney.

CHARLES L. CARTER.

Subscribed and sworn to before me this 23d day of July, A. D. 1894.

CHARLES F. PETERSON,

Clerk 1st Circuit Court.

[Endorsed]: Circuit Court First Circuit. In Equity. Judd et al. vs. Brown. Motion for Attorneys to Display Authorization. Filed July 23, 1894. Charles F. Peterson, Clerk. [115—59]

In the Circuit Court, 1st Circuit.

IN EQUITY.

IRENE HAALOU II BROWN et al.

vs.

C. A. BROWN.

Affidavit of J. Alfred Magoon.

Honolulu, Oahu,

July 27th, 1894,—ss.

Now comes J. Alfred Magoon, and on oath deposes and says, that he denies saying to C. L. Carter, Esq., that Mrs. Irene H. I. Brown refused to authorize any further proceeding looking towards a discontinuance on her behalf.

That on the 28th day of June, 1894 (and to the best of deponent's knowledge and belief it was late in the afternoon of said day), this deponent received copy of motion to have the above-entitled cause set for hearing the next day at 10 A. M. notwithstanding that said Mrs. Brown had previously filed her written request for discontinuance which discontinuance when it should be amended was to be allowed. That at about 8 A. M. the next day, June 29th, deponent inquired for said Mrs. Brown and learned that she was at Waikiki, and was without a telephone and that she was lame and unable to get out of bed. That deponent thereupon sent a carriage with the amended request for discontinuance to said Mrs. Brown with instructions to sign the same if she could not come in town. At a few minutes before ten the messenger returned and stated that Mrs. Brown would sign no more papers. That deponent received no instructions to discontinue further proceedings in her behalf, and felt satisfied that she, Mrs. Brown, had misunderstood the nature of the paper sent to her. That it was impossible [116—60] to communicate with her again before the hour set for hearing plain-

tiff's motion. That said paper was a matter of form merely and in furtherance if the written discontinuance of said Mrs. Brown, allowed by the Court over the strenuous opposition of said C. L. Carter, Esq. That shortly after summons was served in said cause said Mrs. Brown informed deponent that it had been served in violation of her express instructions to said C. A. Carter, Esq., not to serve the same. That in view of this statement of said Mrs. Brown to deponent and her said request to discontinue and her statements that she did not wish to proceed against her husband deponent felt it was his duty to sign the said amendment and accordingly did so.

J. ALFRED MAGOON.

Subscribed and sworn to before me this 26th day of July, 1894.

CHARLES F. PETERSON,
Clerk.

[Endorsed]: In the Circuit Court, 1st Circuit. Irene H. I. Brown et al. vs. C. A. Brown. Affidavit of J. Alfred Magoon. Filed July 27, 1894. Charles F. Peterson, Clerk. [117—61]

In the Circuit Court of the First Circuit, Hawaiian Islands.

IN EQUITY.

IRENE HAALOU II BROWN a Married Woman,
and GEORGE II BROWN and FRANCIS
HYDE II BROWN, Minors, by Their Next
Friend A. F. JUDD, and A. F. JUDD and
SANFORD B. DOLE

vs.

CHARLES A. BROWN.

Amended Complaint.

**BILL TO DECLARE AND EXECUTE A TRUST
AND FOR AN ACCOUNTING.**

To the Hon. W. A. WHITING, First Judge of the
Circuit Court aforesaid.

Irene Haalou Ii Brown, a married woman, and
George Ii Brown and Francis Hyde Ii Brown,
minors, by their next friend, A. F. Judd and Sanford
B. Dole, complaining of Charles A. Brown, respect-
fully represent:

1st. That the above complainants and defendant
are residents of Honolulu, Island of Oahu.

2nd. That heretofore, to wit, on the 2d day of
May, A. D. 1870, one John Ii, a resident of the Island
of Oahu, deceased on said Island of Oahu, leaving a
large estate in real and personal property, situated
on said Island of Oahu, and elsewhere in this
Country, which he devised by will duly admitted to
probate in the Supreme Court of the Hawaiian
Islands on the 10th day of June, A. D. 1870, a copy
of which will is hereto attached, marked exhibit "A"
and made a part hereof. [118—62]

3rd. That upon the 13th day of June, A. D. 1870,
your complainant A. F. Judd and one J. Komoike-
huehu, pursuant to the provisions of the said will,
were appointed executors of said will, and guardians
of the person and property of one of the benefici-
aries named in said will, said complainant Irene
Haalou Ii Brown, then unmarried and being an
infant aged about nine months.

4th. That the said A. F. Judd and J. Komoike-

huehu duly qualified as such executors and guardians and thereafter duly performed the duties of executors and guardians provided for by said will and by the general law.

5th. That upon the 29th day of January, A. D. 1875, the said J. Komoikehuehu resigned his trust and thereafter in the year 1876 died. Upon the 29th day of January, A. D. 1875, said Sanford B. Dole was duly appointed in his place as administrator with the will annexed and guardian of said Irene Haalou Ii Brown and thereupon duly qualified as such executor and guardian and thereafter jointly with said A. F. Judd performed and carried out their said duties as executors and guardians aforesaid continuously until the 13th day of November, A. D. 1886, when the said A. F. Judd and Sanford B. Dole applied to the court for their discharge as guardians of the said Irene Haalou Ii Brown on the ground that their powers as guardians had ceased to be operative by the marriage of the said Irene Haalou Ii Brown to the said Charles A. Brown upon the 30th day of September, A. D. 1886, a copy of which petition and the order for discharge as guardians aforesaid made pursuant thereto are hereto attached marked respectively exhibits "B" and "C" and made a part hereof.

6th. That no formal application has ever been made either by the said A. F. Judd or Sanford B. Dole for discharge as executors of said will and as a matter of fact neither the said A. F. Judd or [119—
63] the said Sanford B. Dole have ever been discharged as executors aforesaid.

7th. That the said A. F. Judd upon receiving his

appointment as executor and guardian as aforesaid also received from the Court at the same time an instrument purporting to be and duly certified to by the clerk of the court as and for and which said A. F. Judd believed to be a true and correct copy of the said last will and testament of the said John Ii and from which said A. F. Judd and Sanford B. Dole while acting as executors and guardians as aforesaid exclusively determined and construed their powers and duties under said will, a copy of the instrument delivered to the said A. F. Judd as aforesaid being hereto attached marked exhibit "D" and made a part hereof.

8th. That in said copy of said will delivered to said A. F. Judd by the Court as aforesaid the following words in the original were omitted: "O laua o na hooko kauoha i ka wa e ola ana kuu kaikamahine a i kana mau keiki," whereby the said A. F. Judd and later his coexecutor Sanford B. Dole were not fully advised of the true nature and intent of the said will, the said A. F. Judd and later the said Sanford B. Dole then entertaining the belief and opinion that no trust was created under and by said will that would not terminate whenever the said Irene Haalou Ii Brown attained her majority or married with the consent of her guardians and under such opinion and belief they, the said A. F. Judd and Sanford B. Dole, filed their petition for discharge as guardians as aforesaid and upon the allowance of said petition delivered over to said Irene Haalou Ii Brown and her husband Charles A. Brown absolutely and unconditionally and as if discharged from every trust

or obligation named in said will all of the property devised to the said Irene Haalou Ii Brown by the will aforesaid, and since the date of said discharge as guardians as aforesaid and the delivery of said [120—64] property as aforesaid to the said Irene Haalou Ii Brown and the said Charles A. Brown neither the said A. F. Judd nor the said Sanford B. Dole have exercised any authority or control over said property or attempted in any way whatsoever to execute or perform the terms and conditions of said will and the trusts imposed thereby.

9th. That the said A. F. Judd and Sanford B. Dole upon recent consideration of the terms and provisions of said original will have come to the belief and opinion and hereby allege that by said will the said A. F. Judd and J. Komoikehuehu and their successors were made not merely executors of said will and guardians of the person of said Irene Haalou Ii Brown but were also made and constituted trustees under said will and as such trustees were given the right to the possession, control and administration of the entire estate left by decedent, excepting specific legacies, during the life of the said Irene Haalou Ii Brown whether married or not and that the retention of the control of the said estate by the said executors and their successors was imposed as an obligation and duty upon said trustees, which obligation and duty the said A. F. Judd and Sanford B. Dole now feel called upon to execute and perform if their present construction of the said will and the terms thereof be found to be correct by this Court, and for that purpose the said A. F. Judd as sole sur-

viving trustee named under said will and the said Sanford B. Dole successor of the said J. Komoike-huehu as aforesaid submit the construction of said will to the adjudication of this Court, and as trustees ask that the same be construed and their duties and obligations as trustees be authoritatively defined.

10th. That since the discharge of the said A. F. Judd and Sanford B. Dole as guardians aforesaid, the said Charles A. Brown has had possession of the entire estate delivered to the said Irene [121—65] Haalou Ii Brown and himself the said Charles A. Brown as aforesaid, and has taken upon himself the entire control and management thereof and now claims the personal right to the exclusive use and appropriation of all the rents, issues and profits of the said estate and also the exclusive control and management thereof and contends that under and by virtue of said will no trust was created which survived the marriage of the said Irene Haalou Ii Brown and the discharge of the said guardians as aforesaid and under such contention utterly declines and refuses to allow the said A. F. Judd and Sanford B. Dole or either of them, to take possession of said estate or to assume the management and control thereof or otherwise to execute or carry out the trusts imposed upon the trustees named in said will and their successors.

11th. That two children have been born to said C. A. Brown and Irene Haalou Ii Brown by the said marriage, to wit, George Ii Brown, aged six and one-half years, and the said Francis Hyde Ii Brown, aged about six months.

12th. That under and by said will provision was made for the children of the said Irene Haalou Ii Brown and also for the support of said Irene Haalou Ii Brown, and it is important to obtain a construction of such provisions and the relative rights under said will of such minor children and the said Irene Haalou Ii Brown and the said Charles A. Brown in and to the said estate, and to the income thereof, and the duties of the said trustees to the several beneficiaries aforesaid under said will.

WHEREFORE COMPLAINANTS PRAY:

1st. That the said Charles A. Brown be duly summoned to appear and answer this complaint.

2nd. That the terms and provisions of said will and the duties and obligations imposed, thereunder upon the said A. F. Judd and S. B. Dole as aforesaid be defined and determined. [122—66]

3rd. That if the contention of your petitioners regarding the true intent and meaning of said will be found to be correct and that there remain certain trusts created under said will yet to be performed, that the Court do thereupon declare and execute such trusts, and that the said Charles A. Brown be declared to hold the said estate for the uses and purposes named in said will, and that the said A. F. Judd and S. B. Dole be reinstated as executors and trustees of said will and estate, and that the said C. A. Brown be ordered to deliver over the possession, control and management of said estate to the said A. F. Judd and S. B. Dole, and for costs and such other

and further relief as to the Court seems meet.

A. F. JUDD.

SANFORD B. DOLE.

W. A. KINNEY,

Attorneys for Plaintiffs. [123—67]

Hawaiian Islands,

Honolulu, Oahu,—ss.

A. F. Judd, being duly sworn, deposes and says that the allegations in the foregoing petition are true except as to those things alleged on information and belief, and those he believes to be true.

A. F. JUDD.

Subscribed and sworn to before me this 10th day of August, A. D. 1894.

CHARLES F. PETERSON,

Clerk.

[Endorsed]: Circuit Court, First Circuit. In Equity. Judd et al. vs. C. A. Brown. Amended Complaint. Filed August 10, 1894. Charles F. Peterson, Clerk. [124—68]

In the Circuit Court, First Circuit.

IN EQUITY.

I. H. II BROWN et al.

vs.

C. A. BROWN.

Stipulation Allowing Defendant Ten Days to Plead.

It is hereby stipulated and agreed that defendant shall have ten days' further time in which to appear

124 *The John Ii Estate, Limited, et al.*

and plead to the amended complaint filed in the above-entitled cause.

Dated Honolulu, August 20th, 1894.

CARTER & CARTER,
W. A. KINNEY,
Attys. for Plaintiffs.
F. M. HATCH and
J. ALFRED MAGOON,
Attys. for Defendant.

[Endorsed]: Circuit Court, 1st Circuit. In Equity. I. H. Ii Brown et al. vs. C. H. Brown. Stipulation for Time. Filed August 20, 1894. Henry Smith, Clerk. [125—69]

In the Circuit Court, First Circuit.

IN EQUITY.

IRENE H. II BROWN et al.

vs.

C. A. BROWN.

Stipulation Extending Time to Plead Ten Days.

The time for appearance and to plead in the above-entitled matter is hereby extended for ten days from date hereof.

Dated August 29, 1894.

CARTER & CARTER,
Attys. for Plaintiffs.
J. ALFRED MAGOON and
F. M. HATCH,
Attys. for Deft.

[Endorsed]: Circuit Court, 1st Circuit. In Equity. Irene H. Ii Brown et al. vs. C. A. Brown.

Additional Time to Appear and Plead. Filed Aug. 29, 1894. Geo. Lucas, Clerk. [126—70]

In the Circuit Court of the First Circuit, Hawaiian Islands.

IN EQUITY.

IRENE HAALOU II BROWN, a Married Woman,
and GEORGE II BROWN and FRANCIS
HYDE II BROWN, Minors, by Their Next
Friend, A. F. JUDD, and A. F. JUDD and
SANFORD B. DOLE

vs.

CHARLES A. BROWN.

Answer of Charles A. Brown.

**BILL TO DECLARE AND EXECUTE A TRUST
AND FOR AN ACCOUNTING.**

And now comes Charles A. Brown, defendant in the above-entitled suit, and saving to himself all right of exception to the manifold errors and insufficiencies of said bill of complaint, for answer to so much as he is advised it is necessary to answer saith:

FIRST: That he admits that the complainants and defendant are residents of Honolulu, Island of Oahu.

SECOND: That he admits that on the 2d day of May, 1870, one, John Ii, a resident of the Island of Oahu, died, leaving estate which he devised by will duly admitted to probate in the Supreme Court of the Hawaiian Islands on the 10th day of June, 1870, a copy of which is made a part of said bill.

THIRD: That he admits that on the 13th day of June, 1870, the complainant A. F. Judd and one J.

Komoikehuehu, were appointed executors of said will, and guardians of the person and property of Irene Haalou Ii Brown, then unmarried, and being an infant aged about nine months. [127—71]

FOURTH: That he admits that said A. F. Judd and J. Komoikehuehu duly qualified as such executors and guardians and undertook said trusts.

FIFTH: That he admits that on the 29th day of January, 1875, said J. Komoikehuehu resigned his trust and thereafter in the year 1876 died; and on the 29th day of January, 1875, the complainant Sanford B. Dole was duly appointed in his place as administrator with the will annexed and guardian of said Irene Haalou Ii Brown and thereupon duly qualified as such executor and guardian, and acted jointly with said complainant A. F. Judd in the performance of said trust. That he admits that on the 13th day of November, 1886, said complainants applied to the court for their discharge as guardians of the said Irene Haalou Ii Brown on the ground that their powers as such guardians had ceased to be operative by the marriage of the said Irene Haalou Ii Brown to this defendant on the 30th day of September, 1886; and that a copy of said petition and order of discharge as guardians is attached to said bill of complaint.

SIXTH: That he is ignorant whether an application has been made by said complainants for discharge as executors of said will; and leaves the same to be proved by complainants.

SEVENTH: That he admits that said complainant A. F. Judd upon receiving his appointment as

aforesaid also received from the court at the same time an instrument purporting to be and duly certified by the Clerk of the Court to be, and believed by said complainant to be, a true and correct copy of said will; but he denies that said complainants while acting as such executors and guardians did or should have exclusively determined and construed their powers and duties from said copy. [128—72]

EIGHTH: That he is ignorant as to the contents of the copy of the will delivered to said A. F. Judd by the Court and whether or not he and later his co-executor were not fully advised of the nature and intent of said will, and leaves to complainants the proof of any omission of words contained in the original; and says that the original will was at all times accessible for inspection; and he further says that at the time said executors turned over said estate to him a true copy of said delivery of said estate said executors have not exercised any authority or control over said estate; acting under the belief that no trust was created which did not terminate upon the marriage or majority of said Irene Haalou Ii Brown.

NINTH: That defendant is ignorant as to the belief and opinion of said A. F. Judd and S. B. Dole in regard to the provisions and terms of said will and denies the allegation that by said will the said A. F. Judd and J. Komoikehuehu and their successors were made not merely executors of said will and guardians of the person of said Irene Haalou Ii Brown but were also made and constituted trustees under said will and as such trustees were given the right to the possession, control and administration of the entire

estate left by decedent, excepting specific legacies, during the life of the said Irene Haalou Ii Brown whether married or not and that the retention of the control of the said estate by the said executors and their successors was imposed as an obligation and duty upon said trustees. And respondent submits and alleges that by the true construction of said will said Irene Haalou Ii Brown took an estate in fee simple in the land and other property devised to her in said will; that no valid trust was intended or created by said will; other than for the payment of the debts of [129—73] said testator and for the guardianship of said Irene Haalou Ii Brown during her minority.

TENTH: Defendant admits that since the discharge of said complainants as such guardians he has had possession of the entire estate devised to said Irene Haalou Ii Brown by said will; and has had the exclusive control and management thereof; and contends that under said will no trust was created other than one of guardianship during the minority of Irene Haalou Ii Brown. Defendant admits that he refused to allow the said complainants or either of them to take possession of said estate, or assume the management and control thereof; and he says that he has been in possession of said estate as the husband of said Irene Haalou Ii Brown in accordance with the rights and obligations imposed upon him by the law as her husband.

ELEVENTH: He admits that two children have been born to said Irene Haalou Ii Brown and himself as alleged in said bill.

TWELFTH: He denies that by said will provision was made for the support of said children other than in the contingency of the death of said Irene Haalou Ii Brown prior to the death of testator.

Wherefore he prays that said bill may be dismissed with costs.

C. A. BROWN. [130—74]

Hawaiian Islands,
Island of Oahu,—ss.

Personally appeared Charles A. Brown, defendant herein and made oath that the matters above alleged are true, except as to those alleged on information and those he believes to be true.

C. A. BROWN.

Subscribed and sworn to this 11th day of Oct., A. D. 1894, before me,

CHARLES F. PETERSON,
Clerk.

[Endorsed]: Circuit Court First Circuit. In Equity. Irene Haalou Ii Brown, et al. vs. Charles A. Brown. Answer. J. A. Magoon, F. M. Hatch, Esq., for Deft. Filed Oct. 11, 1894. Charles F. Peterson, Clerk. [131—75]

Circuit Court, First Circuit, Haw. Is.

IN EQUITY.

Before Judge COOPER.

Tuesday, May 1, 1894.

IRENE H. I. BROWN et al.,

vs.

C. A. BROWN.

Order Allowing Amendment of Motion.
BILL TO DECLARE A TRUST AND FOR AN
ACCOUNTING.

Motion of Defendant to Dismiss the Bill.
CARTER & CARTER & W. A. KINNEY, for
Plaintiffs.
J. A. MAGOON & F. M. HATCH, for Defend-
ant.

After argument by respective counsel the Court allows defd. to amend his motion so that the motion will be to dismiss the bill so far as Mrs. Irene H. I. Brown is concerned.

CHARLES F. PETERSON,
Clerk.

Order Allowing Mrs. Brown to Discontinue Further
Proceedings.

Wednesday, July 11th, 1894.
Hearing before COOPER, J.
Motion that Plaintiff Irene Ii Brown be not Allowed
to Change Her Status in Said Cause.
CARTER & CARTER & W. A. KINNEY, for
Plaintiff.
F. M. HATCH & J. A. MAGOON, for Defend-
ant.

Mr. Carter reads the motion, also a claim for \$250 for professional services and affidavit of A. F. Judd, affidavit of C. L. Carter, affidavit of A. W. Carter.
[132—76]

Argued by respective counsel.

The Court allows Mrs. Brown to discontinue further proceedings on her paying the costs accrued and

allows the plaintiff to amend the complaint as far as Mrs. Brown appears as plaintiff.

Mr. Kinney notes exceptions to the Court ruling.

Order Allowing Plaintiff's Exceptions.

Thursday, July 12th, 1894.

Hearing before COOPER, J.

Objections to Plaintiff's Exception.

W. A. KINNEY, for Plaintiff.

J. A. MAGOON, for Defendant.

Mr. Kinney reads the exceptions and argues in support of the exceptions.

Mr. Magoon argues *contra*.

The Court allows the plaintiff's exceptions as presented.

C. LUCAS,
Clerk.

Order Re Signing of Decree.

Friday, July 27, 1894.

Before Judge COOPER.

Motion of Plaintiffs for Attorneys to Display Authorization and also as to Form of Decree.

CARTER & CARTER and W. A. KINNEY,
for Plaintiff.

HATCH & MAGOON, for Defendant. [133—

77]

C. L. Carter reads the motion and affidavit made by himself.

Mr. Magoon reads counter affidavit.

The Court upon the present showing, declines to sign decree for five days from today at which time it will sign the decree if Mrs. Brown does not make any appearance.

Minutes of August 1, 1894, Re Signing of Decree.

Wednesday August 1st, 1894.

Before COOPER, J.

C. L. CARTER, for Plaintiff.

F. M. HATCH, for Defendant.

The case is explained to Mrs. Brown by the Court and in answer to the Court states that she signed the discontinuance voluntarily, and as far as personal matters are concerned, I wish to discontinue. I do not want to have the whole case thrown out of court, I wish to have my father's will construed.

In answer to Mr. Hatch:

I rather have a decision on the construction of father's will and after let Mr. Brown account, but have them two distinct matters.

In answer to C. L. Carter:

I would rather be with Uncle Frank in the matter of the construction of the will, I want to have both sides presented to the Court. I would rather have the property under Uncle Frank's charge.

The Court declines to sign the decree, and allows plaintiffs five days in which to amend the bill, the amendment to be such as [134—78] to limit the question to the construction of the will of the late John Ii.

GEO. LUCAS,

Clerk. [135—79]

Declination to Further Consider Case.

DEPARTMENT OF FOREIGN AFFAIRS.

Honolulu H. I., February, 26/96.

(In re Brown vs. Brown.)

Gentlemen:—

I have made several attempts to consider this case and to render a decision, but the duties of my office have so engrossed my attention that I have not been able to do so; and as I see no value in a *pro forma* decision in the matter, I feel compelled to decline to further consider the case. I regret to find myself under the necessity of taking this action, but as I do not see my way clear in the near future to have sufficient time to devote to the case I feel it but just to the litigants that I adopt this course.

Yours very truly,

HENRY E. COOPER.

To Messrs. W. A. Kinney and S. M. Ballou,
Attorneys for Plaintiff.

Messrs. Cecil Brown, J. A. Magoon, A. S. Humphreys, F. M. Hatch and Lyle A. Dickey,
Attorneys for Defendant.

[Endorsed]: Circuit Court First Circuit. Irene Ii Brown et al., vs. C. A. Brown. Declination Declining to Decide Case. Filed Febry. 26, 1896. George Lucas, Clerk. [136—80]

134 *The John Ii Estate, Limited, et al.*

*In the Circuit Court of the First Circuit, Hawaiian
Islands.*

At Chambers, 1895.

H. E. COOPER, J., Presiding.

IRENE HAALOU II BROWN et al.

vs.

CHARLES A. BROWN.

Order of Submission.

Honolulu, Thursday, October 24th, 1895.

CLERK'S MINUTES.

**BILL TO DECLARE AND EXECUTE A TRUST
AND FOR AN ACCOUNTING.**

CARTER and KINNEY & BALLOU, for Plain-
tiffs.

HATCH, BROWN, MAGOON, DICKEY &
HUMPHREYS, for Defendant.

Mr. Ballou reads the complaint.

Mr. Dickey reads the answer.

Mr. Ballou calls as witness A. F. Judd.

Mr. Ballou offers in evidence:

Ex. A. Probate Records in re estate of John Ii
(P. 482).

Ex. B. Certified copy of the will of John Ii being
the will in possession of the executors.

Mr. Ballou argues.

Mr. Hatch argues.

Mr. Ballou replies.

The Court takes the matter under consideration.

GEORGE LUCAS.

Clerk. [137—81]

*In the Circuit Court of the First Circuit, Hawaiian
Islands.*

BROWN

vs.

BROWN.

Stipulation for Decision.

BILL FOR INSTRUCTIONS.

It is hereby stipulated and agreed between counsel in the above suit that the decision may be rendered by Judge Cooper, after his resignation from the bench, as of the time he was second Judge of the First Circuit.

Honolulu, H. I., 2d October, A. D. 1895.

F. M. HATCH,

CECIL BROWN,

J. ALFRED MAGOON, and

A. S. HUMPHREYS,

Attys. for Deft.

W. A. KINNEY,

S. M. BALLOU,

Attys. for Plffs.

[Endorsed]: In the Circuit Court First Circuit.
E. 779. 9/460. Brown vs. Brown. Stipulation for
Decision. Filed November 2, 1895. Geo. Lucas,
Clerk. [138—82]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

IN EQUITY.

IRENE HAALOU II BROWN, a Married Woman,
and GEORGE II BROWN and FRANCIS
HYDE II BROWN, Minors, by Their Next
Friend A. F. JUDD, and A. F. JUDD,
Plaintiffs,

vs.

CHARLES A. BROWN,
Defendant.

**Certificate of Clerk U. S. Circuit Court to Transcript
of Record in Brown et al. vs. Brown.**

**BILL TO DECLARE AND EXECUTE A TRUST
AND FOR AN ACCOUNTING.**

Territory of Hawaii,
City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Circuit Court
of the First Judicial Circuit, Territory of Hawaii,
do hereby certify that the foregoing documents and
attached hereto together with the endorsements
thereon and enumerated hereunder, to wit:

1. Bill of Complaint, and attached thereto as exhibits thereof, are Exhibit "A," Copy of the Will of John Ii in the Hawaiian language, Exhibit "B," Copy petition of guardians for their discharge In re Guardianship of Irene H. Ii, and Exhibit "C," Copy order of discharge of guardians In re Guardianship of

Irene H. Ii, and also attached to said complaint, are a second copy of the will of said John Ii, Copy of prayer of A. F. Judd for leave to prosecute and order annexed, Copy affidavit of Irene Haalou Ii Brown and the affidavit of A. F. Judd;

2. Copy chambers summons and annexed is copy of service of summons and of the petition and complaint;
3. Discontinuance by Irene H. Ii Brown;
4. Special appearance of C. A. Brown;
5. Motion by plaintiffs for hearing and notice of motion; [139—83]
6. Motion that the plaintiff Irene Ii Brown be not allowed to change her status in this cause until the account due her attorneys *are* paid in full, annexed thereto are a Copy of the bill of W. A. Kinney et al., also copies of the affidavits of A. F. Judd, C. L. Carter and A. W. Carter;
7. Exception by plaintiffs;
8. Amended discontinuance by Irene H. Ii Brown, annexed thereto is the affidavit of J. Alfred Magoon;
9. Order on motion for leave to discontinue;
10. Motion by plaintiffs for attorneys to display authorization, annexed thereto is the affidavit of C. L. Carter;
11. Affidavit of J. Alfred Magoon;
12. Amended bill of complaint;
13. Stipulation that defendant have ten days' fur-

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ther time in which to appear and plead to the amended bill of complaint;

14. Stipulation granting defendant further time to plead;
15. Answer of Charles A. Brown;
16. Clerk's minutes Circuit Court First Circuit, dated May 1, 1894, July 11, 12 and 27, 1894, and August 1, 1894;
17. Communication by Henry E. Cooper dated February 26, 1896, addressed to Messrs. W. A. Kinney and S. M. Ballou et al., declining to consider the case;
18. Clerk's minutes First Circuit Court, dated October 24, 1895; AND,
19. Stipulation for decision;

—are full true and correct copies of the originals thereof which are now on file in the Clerk's Office of said Circuit Court in the foregoing entitled cause. (Equity Division Number 779.)

I further certify that on an examination of the record in the foregoing entitled cause I find that no decree has been entered or filed therein.

Witness my hand and the Seal of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Honolulu, Oahu, this 12th day of November, A. D. 1909.

[Seal] (Signed) JAMES A. THOMPSON,
Clerk Circuit Court of the First Judicial Circuit,
Territory of Hawaii. [140—84]

The foregoing Transcript of Record was endorsed as follows:

No. 47 United States District Court, Territory of

Hawaii. United States of America vs. John Ii Estate, Ltd., an Hawaiian Corporation, et al. Exhibit 1 for Geo. Ii Brown and Francis Hyde Ii Brown Respondents. Filed Dec. 2, 1909. A. C. Murphy, Clerk. By A. A. Deas, Deputy Clerk.

Equity No. 779. Circuit Court First Circuit. Territory of Hawaii. Irene Haalou Ii Brown, a Married Woman, and George Ii Brown and Francis Hyde Ii Brown, Minors, by Their Next Friend A. F. Judd, vs. Charles A. Brown. Certified Transcript of Record. [141—85]

**Exhibit No. 2—Transcript of Record in Cause
Entitled Irene Haalou Ii Brown et al. vs. Charles
A. Brown, in the Supreme Court of the Territory
of Hawaii.**

In the Supreme Court of the Territory of Hawaii.

IRENE HAALOU II BROWN, a Married Woman,
and GEORGE II BROWN, and FRANCIS
HYDE II BROWN, Minors, by Their Next
Friend A. F. JUDD, and A. F. JUDD

vs.

CHARLES A. BROWN.

TRANSCRIPT OF RECORD. [142—86]

In the Circuit Court, First Circuit.

IRENE II BROWN et al.

vs.

CHARLES A. BROWN.

Reserved Questions of Law.

The following questions of law in the above-entitled cause are hereby reserved for the consideration of the Supreme Court under Chap. LVII, Sec. 72, Laws of 1892.

1. Was a trust created in the property devised to Irene Ii by the will of her father John Ii?

2. If such a trust was created is the trust still in force Irene having married, attained majority and had issue of said marriage, which issue still survives?

3. If such a trust still exists is the interest of Irene Ii Brown under the same absolute or for life only?

4. If such trust still exists is it such a trust that the court will upon the proper motion order an immediate conveyance of the property to Irene Ii Brown?

5. Has Irene Ii Brown, a fee simple title in said property or, is her estate one for life only?

6. Was an estate in perpetuity created by said will and if so was its effect to vest the estate absolutely in Irene Ii Brown?

7. If there are any remainders in said property are they [143—87] vested or contingent and in what person?

8. What legal and equitable estates have the several parties plaintiff and defendant under the will of John Ii and the circumstances shown by the plead-

ings and evidence?

(Sig.) A. PERRY.

Second Judge Circuit Court First Judicial Circuit.

Approved.

J. ALFRED MAGOON and

W. S. EDINGS,

For C. A. Brown.

O. K.

KINNEY & BALLOU,

Atty. for Plffs.

[Endorsed]: E. 779. 12/19. Circuit Court, First Circuit. Brown vs. Brown. Reserved Questions of Law. Filed April 16, 1896. George Lucas, Clerk. [144—88]

In the Supreme Court of the Hawaiian Islands.

I. I. BROWN,

vs.

C. A. BROWN.

Stipulation Setting Case for April 24, 1896.

It is hereby stipulated and agreed between counsel that the above-entitled case may be heard by the Supreme Court in vacation and that the same may be set for Friday, April 24th, 1896.

Apr. 9th/96.

KINNEY & BALLOU,

Attys. for Plff.

J. ALFRED MAGOON &

W. S. EDINGS,

Attys. for Deft.

Approved for May 1, /96.

W. F. FREAR, J.

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[Endorsed]: In the Supreme Court. E. 779.
12/19. Brown vs. Brown. Stipulation for Hearing.
Filed April 16, 1896. George Lucas, Clerk. [145—
89]

In the Supreme Court of the Hawaiian Islands.
June Term, 1896.

A. F. JUDD et al.

vs.

C. A. BROWN.

**Request and Authority to Judge to Sit, Filed June
19, 1896.**

Request under Section 56 of the Act to Reorganize
the Judiciary Department.

The nineteenth day of June, in the year of Our
Lord one thousand eight hundred and ninety-six.

To W. R. Castle, Esq.,

Sir:

Chief Justice Judd and Mr. Justice Frear being
disqualified to sit in the above-entitled case, I, the
remaining Justice of the Supreme Court, hereby re-
quest and authorize you to sit with me in hearing and
determining the said case.

W. AUSTIN WHITING.

[Endorsed]: Supreme Court Hawaiian Islands.
A. F. Judd, et al. vs. C. A. Brown. Order and Re-
quest. Filed June 19th, 1896. George Lucas,
Clerk. [146—90]

In the Supreme Court of the Hawaiian Islands.

June Term, 1896.

A. F. JUDD et al.

vs.

C. A. BROWN.

**Request and Authority to Judge to Sit, Filed June
19, 1896.**

Request under Section 56 of the Act to Reorganize
the Judiciary Department.

The nineteenth day of June, in the year of Our
Lord one thousand eight hundred and ninety-six.

To L. A. Thurston, Esq.,

Sir:

Chief Justice Judd and Mr. Justice Frear being
disqualified to sit in the above-entitled case, I, the
remaining Justice of the Supreme Court hereby re-
quest and authorize you to sit with me in hearing and
determining the said case.

W. AUSTIN WHITING.

[Endorsed]: Supreme Court Hawaiian Islands.
A. F. Judd et al. vs. C. A. Brown. Order and Re-
quest. Filed June 19th, 1896. George Lucas,
Deputy Clerk. [147—91]

Supreme Court of the Hawaiian Islands.

June Term, 1896.

A. F. JUDD et al.

vs.

C. A. BROWN.

Order of Submission, June 19, 1896.

Honolulu, Friday, June 19th, 1896.

CLERK'S MINUTES.

Reserved Question of Law.

Before WHITING, J., W. R. CASTLE, Esq., and
L. A. THURSTON, Esq.

• KINNEY & BALLOU for Plaintiff.

MAGOON and EDINGS for Defendant.

Mr. Ballou reads the complaint also the Will of
John Ii and the Reserved question of Law.

Mr. Ballou argues.

At 4:30 P. M. the Court adjourns for the day.

Saturday, June 20th, 1896.

Mr. Magoon argues.

Mr. Ballou replies.

The Court takes the matter under *the* considera-
tion.

GEORGE LUCAS,

Deputy Clerk. [148—92]

In the Supreme Court of the Hawaiian Islands.

A. F. JUDD, Trustee, et al.,

vs.

C. A. BROWN.

Motion for Rehearing.

BILL FOR THE CONSTRUCTION OF WILL.

Now comes counsel for plaintiff in the above-en-
titled cause and respectfully requests a rehearing in
the above-entitled matter, with the substitution of
another Judge in place of L. A. Thurston, and that
the case may be set for hearing forthwith. This

motion is based upon the record, and upon the affidavits of L. A. Thurston and S. M. Ballou, hereto attached and made a part hereof.

KINNEY & BALLOU,

Attys. for Plaintiffs.

I consent to the hearing of this motion 1:30 P. M. the 29th inst.

J. ALFRED MAGOON,

One of the Attys. for Deft.

[Endorsed]: In the Supreme Court of the Hawaiian Islands. A. F. Judd, et al. vs. C. A. Brown. Motion for Rehearing. [149—93]

In the Supreme Court of the Hawaiian Islands.

A. F. JUDD, Trustee, et al.,

vs.

C. A. BROWN.

Affidavit of L. A. Thurston.

BILL FOR CONSTRUCTION OF WILL.

Honolulu, Oahu,—ss.

L. A. Thurston, being duly sworn, deposes and says that he was duly requested to sit as Justice in the above-entitled cause at the first hearing thereof; that no consultation of the justices in said case has yet been held; that deponent is about to leave the Hawaiian Islands for the United States of America to be gone several months; that it is utterly impossible for him, in the short space of time still remaining, to give proper consideration to a case of this magnitude, and he respectfully declines to join in an opinion in which he has not put his best endeavors, and

hereby requests leave to withdraw from further consideration of the case, and let another justice be appointed in his stead.

L. A. THURSTON.

Subscribed and sworn to before me this 28th day of January, A. D. 1897.

[Seal]

W. L. STANLEY,
Notary Public.

[Endorsed]: In the Supreme Court of the Hawaiian Islands. A. F. Judd et al. vs. C. A. Brown. Affidavit of L. A. Thurston. [150—94]

In the Supreme Court of the Hawaiian Islands.

A. F. JUDD, Trustee, et al.,

vs.

C. A. BROWN.

Affidavit of S. M. Ballou.

BILL FOR THE CONSTRUCTION OF WILL.
Honolulu, Oahu,—ss.

S. M. Ballou, being duly sworn, deposes and says that he is one of the counsel for plaintiff in the above-entitled case; that the case has become one of great urgency on account of the following facts which he alleges upon information and belief, to wit: that the decision of this case involves the question of whether the title to a large tract of land required by the projected Oahu Plantation is in Irene E. Brown or in trustees; that the said Irene E. Brown and her husband, C. A. Brown, on the belief that the title to the said land is in them have entered into an agreement giving one Lincoln McCandless a right to pasturage

on the lands in question; that said Lincoln McCandless refuses to release said pasturage in order that a lease may be made to the projected Oahu plantation unless he is paid an exorbitant sum, to wit, the sum of six thousand dollars per year, which sum Irene E. Brown and C. A. Brown refuse to pay although offering said McCandless a liberal sum for the pasturage right covered by said agreement.

That the promoter and agents of the Oahu plantation, to wit, J. F. Hackfeld and Company, have informed the parties to this controversy that said controversy must be settled and a lease with a good title must be given forthwith, or the projected Oahu Plantation will be abandoned entirely, which result would cause irreparable injury to all parties concerned in this controversy; [151—95] that should the decision in this case reach the conclusion that the title to the land in question is in certain trustees, the said trustees could at once break the dead-lock now existing between the said Irene E. Brown and C. A. Brown on the one hand and Lincoln McCandless on the other hand, by giving a valid lease to the projected Oahu plantation.

That besides the threatened total abandonment of the enterprise there is danger that it may be postponed for one year on account of the pending controversy for the reason that certain pumps must be ordered at once if the plantation is to be started this year, and the agents and promoters of said plantation refuse to take any steps whatever until they are assured of the lease in question.

And further deponent saith not.

S. W. BALLOU.

Subscribed and sworn to before me this 28th day of January, 1897.

[Seal]

W. L. STANLEY,
Notary Public.

[Endorsed]: E. 779. 12/19. In the Supreme Court of the Hawaiian Islands. A. F. Judd et al. vs. C. A. Brown. Motion for Rehearing. Filed Jany. 29th, 1897. George Lucas, Clerk. [152—96]

In the Supreme Court of the Hawaiian Islands.

In Vacation, 1897.

A. F. JUDD et al.

vs.

C. A. BROWN.

Request and Authority to Judge to Sit, Filed April 9, 1897.

Request under Section 56 of the Act to Reorganize the Judiciary Department.

The ninth day of April, in the year of our Lord *on* thousand eight hundred and ninety-seven.

To Paul Neumann, Esq.,

Sir:

Chief Justice Judd and Mr. Justice Frear being disqualified to sit in the above-entitled case, I, the remaining Justice of the Supreme Court, hereby request and authorize you to sit with me in hearing and determining the said case.

W. AUSTIN WHITING.

[Endorsed]: Supreme Court Hawaiian Islands. A. F. Judd et al. vs. C. A. Brown. Order and Request. Filed April 9th, 1897. George Lucas, Deputy Clerk. [153—97]

In the Supreme Court of the Hawaiian Islands.

In Vacation, 1897.

A. F. JUDD et al.

vs.

C. A. BROWN.

**Request and Authority to Judge to Sit, Filed April
9, 1897.**

Request under Section 56 of the Act to Reorganize
the Judiciary Department.

The ninth day of April, in the year of our Lord
one thousand eight hundred and ninety-seven.

To W. R. Castle, Esq.,

Sir:

Chief Justice Judd and Mr. Justice Frear being
disqualified to sit in the above-entitled case, I, the
remaining Justice of the Supreme Court, hereby re-
quest and authorize you to sit with me in hearing and
determining the said case.

W. AUSTIN WHITING.

[Endorsed]: Supreme Court Hawaiian Islands.
A. F. Judd et al. vs. C. A. Brown. Order and Re-
quest. Filed April 9th, 1897. George Lucas,
Deputy Clerk. [154—98]

Supreme Court of the Hawaiian Islands.

In Vacation, 1897.

A. F. JUDD et al.

vs.

C. A. BROWN.

Order of Submission, April 9, 1897.

Honolulu, Friday, April 9th, 1897.

CLERK'S MINUTES.

Reargument.

Reserved Questions of Law.

Before WHITING, J., W. R. CASTLE, Esq., and
P. NEUMANN, Esq.

KINNEY and BALLOU, for Plaintiff.

MAGOON and EDINGS, for Defendant.

Mr. Ballou reads the Amended Bill.

Mr. Edings reads the Answer.

Mr. Ballou reads the translation of John Ii Will
also the reserved questions of law.

Mr. Ballou argues.

Mr. Magoon argues.

Mr. Ballou replies.

The Court takes the matter under consideration.

GEORGE LUCAS,

Deputy Clerk. [155—99]

In the Supreme Court of the Hawaiian Islands.

In Vacation.

IRENE HAALOU II BROWN, a Married Woman,
and **GEORGE II BROWN** and **FRANCIS**
HYDE II BROWN, Minors, by Their Next
Friend, **A. F. JUDD**, and **A. F. JUDD** and
SANFORD B. DOLE,

vs.

CHARLES A. BROWN.

Opinion.

Reserved Questions of Law.

Submitted April 9, 1897. Decided May 4th, 1897.

WHITING, J., and Messrs. W. R. CASTLE and P. NEUMANN, of the Bar, in Place of JUDD, C. J., and FREAR, J., Disqualified.

1. A devise, in these words, "all my property both real and personal shall descend to my heirs who are mentioned below as follows: Airene Haalou Ii my own daughter is the first heir as follows:" (Here follows a description of specific real property), devises an estate in fee simple unless there are subsequent directions in the will expressly qualifying the estate devised.
2. The subsequent direction that should my daughter die having borne children then the property shall descend to her children and should she die without having had any children the property shall descend to her own mother, is not a limitation which lessens the estate in fee simple.
3. The direction in the will appointing executors, etc., in the words "they both to be my executors and guardians of the person and property of my daughter, the first devisee mentioned in this will, all the income from the lands that [156—100] are leased and all other receipts from all the lands of my daughter, they shall have the sole care of it all until she comes of age or has children of her own; they shall be the executors during the lifetime of my daugh-

ter and her children," invests the appointees with a trust which terminates upon the devisee attaining the age of majority or having children of her own.

OPINION OF THE COURT

by

P. NEUMANN, Esq.

This is a suit brought by plaintiffs to obtain a decree of the construction of the will of the father of Mrs. Irene Haalou Ii Brown and grandfather of her children. The will under which the executors and guardians entered upon and continued to execute the trust committed to them is in these words: (as much as is necessary for understanding the decision only is inserted).

"Before Almighty God, Amen.

"I, John Ii of the City of Honolulu, Island of Oahu, Hawaiian Islands, have made and am now making my will and do declare publicly that this is my last will and testament;

"After paying all my debts, all my property both real and personal shall descend to my heirs who are mentioned below as follows:

"First. Airene Haalou Ii my own daughter is the first heir as follows: (a list of lands follows: and one-half of all my personal property.)

"Second. My wife Maria Ii is my second heir.

"(Devising certain lands), and one-half of all my personal property and in case my wife marries again these lands [157—101] shall descend to my daughter, she cannot bequeath them to any one.

* * *

"Third. My Kaikaina J. Komoikehuehu is the third heir. * * *

"By this will of mine I have appointed and I do appoint J. Komoikehuehu, A. F. Judd, they both to be my executors and guardians of the person and property of my daughter, the first devisee mentioned in this will. All the income from the lands that are leased and all other receipts from all the lands of my daughter they shall have the sole care of it all until she comes of age or has children of her own; they shall be the executors during the lifetime of my daughter and her children and carry out my wishes as expressed in this will, and they shall receive compensation the same as provided by law."

"And my executors shall place my daughter in some suitable place where she may be educated in both languages, and my child must be brought up in the path of retitude, and the first fruits received from the lands of my daughter, that is the money received, there shall be taken therefrom ten cents from each dollar which is set apart as an offering to God's Kingdom, the same as I have done. And my executors are to carry out this request of mine."

"And further, if my daughter should die, having borne children, then the property shall descend to her children and if she should die without having had any children the property shall descend to her mother, and if she should be dead then the property shall descend to my brother J. Komoikehuehu."

The following questions of law were reserved by the Court below and certified to this court for its decision.

1. Was a trust created in the property devised to Irene Ii by the will of her father John Ii?

2. If such a trust was created is the trust still in [158—102] force Irene having married, attained majority and had issue of said marriage, which issue still survives?

3. If such a trust still exists, is the interest of Irene Ii Brown under the same absolute or for life only?

4. If such trust still exists is it such a trust that the Court will upon the proper motion order an immediate conveyance of the property to Irene Ii Brown?

5. Has Irene Ii Brown a fee simple title in said property or is her estate one for life only?

6. Was an estate in perpetuity created by said will and if so was its effect to vest the estate absolutely in Irene Brown?

7. If there are any remainders in said property are they vested or contingent and in what person?

8. What legal and adequate estates have the several parties plaintiff and defendant under the will of John Ii and the circumstances shown by the pleadings and evidence?

The first question must be answered in the affirmative. A trust in the property devised to his daughter was created by the will of the testator.

As to the second question the Court decides that upon the marriage and attaining majority of the devisee the trust became extinct.

The third and fourth questions require no answer in view of the conclusion at which this Court arrives

in its consideration of the second question.

In answering the fifth question the Court concludes that Irene Haalou Ii Brown has an estate in fee simple in the property devised to her by her father's will.

Upon this point the case of Hemen vs. Kamakaia, decided [159—103] (10th Haw. p. 547) December 15, 1896, is conclusive. In the case cited the Court say: "It is everywhere held that words of inheritance are not necessary in a will to carry the fee." This view is further supported by the decision in the case of Fowler et al. vs. Duhme et al., 42 N. E. Reports, p. 631.

* * * * *

* * * The testator's intention to name a contingency to happen after his death, to affect the estate devised to the first taker, must appear distinctly from the clear and consistent language of the whole will."

Aside, however, of other considerations and following again the decision in the case of Hemen vs. Kamakaia; by the provisions of this will the birth of a child has made the estate vested in the daughter Irene an indefeasible estate in fee simple. (It is an admitted fact in this cause that a child and children have been born to Irene Ii the devisee.)

The decision of this court upon the preceding questions reserved renders it unnecessary to answer specifically the questions numbered 6, 7 and 8.

The will contains provisions that the executors and guardians shall have the sole care of the income, and "of it all until she comes of age or has children of her own." In those words lies the termination of the functions of the executors or guardians or trustees,

nor does the immediately following sentence: "they shall be the executors during the lifetime of my daughter and her children," or the direction: "And they shall receive compensation the same as provided by law," change the view of this Court that the functions of the trustees ceased upon the devisee's attaining the age of majority or having children of her own.

It is claimed by the plaintiffs that the bequest of the testator of tithes to the Kingdom of God creates an active and continuing trust; it is not at all clear that that bequest has [160—104] such an import. On the contrary the language of the will shows an intention of the testator to bequeath a fixed sum of one-tenth of the income from the devisee's lands to charitable purposes; but not an intention of creating a perpetual trust. The functions of the trustees in that respect ended with the extinction of the trust, that is, when the devisee Irene Haalou attained the age of majority.

The construction of a will should be such as to give effect to the intention of the testator. In the will before the Court, the context demonstrates that the testator intended to vest an estate in fee simple absolute in his daughter Irene, limited only as to the time when the right to control the estate was to take effect; by the provision that the executors or guardians were to have charge of the estate until the devisee attained the age of majority or had children of her own.

In the very next clause of the will, property is devised to the surviving widow "*durante viduitate*," with remainder over to the daughter Irene, and with an express prohibition of the widow's bequeathing

the property devised, to anyone. If the testator had intended to limit the devise to the daughter to a life estate, he would have clearly expressed such limitations in the will. The absence of any such definite expression, makes the rule applicable that an estate in fee and not for life was granted.

The learned counsel for plaintiffs, in concluding their brief do earnestly contend that the last clause of the will reading: "If my daughter should die having borne children then the property shall descend to her children, and if she should die without having had any children, the property shall descend to her mother," etc., shows that the daughter had a life estate only with remainder to issue, and issue failing, to the mother.

This Court must repudiate that view. The clause in the will carries no other meaning than that in the event of the daughter's decease having no issue, the mother became the devisee; [161—105] that the daughter surviving the testator took under the devise to her, and that the estate became, after she bore a child or children, vested in her as an estate in fee simple.

The Court referring to the case of *Booth et al. vs. Baker et al.* (10th Haw. p. 543) decided December 15, 1896, intimates that it follows the *dictum* therein, and though it has consented to decide the questions reserved in this cause, does not wish to establish

thereby a precedent for reserving questions in a cause in equity.

W. AUSTIN WHITING.

WILLIAM R. CASTLE.

PAUL NEUMANN.

KINNEY & BALLOU, for Plaintiffs.

J. A. MAGOON, W. S. EDINGS, CECIL BROWN, L. A. DICKEY, A. S. HUMPHREYS and F. M. HATCH, for Defendant.

[Endorsed]: Supreme Court Hawaiian Islands. A. F. Judd et al. vs. C. A. Brown. Decision. Filed May 4th, 1897. P. D. Kellet, Jr., Clerk. [162—106]

In the Supreme Court of the Territory of Hawaii.

IRENE HAALOU II BROWN, a Married Woman,
and GEORGE II BROWN and FRANCIS
HYDE II BROWN, Minors, by Their Next
Friend, A. F. JUDD and A. F. JUDD,
Plaintiff,

vs.

CHARLES A. BROWN,

Defendant.

**Certificate of Clerk, Supreme Court, to Record in
Brown et al. vs. Brown.**

CLERK'S CERTIFICATE.

Territory of Hawaii,
City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, do hereby certify that the foregoing documents together with the in-

dorsements thereon and enumerated hereunder, to wit:

- 1 Reserved Questions of Law from the Circuit Court of the First Circuit to the Supreme Court;
- 2 Stipulation that the case be heard by the Supreme Court during vacation;
- 3 Order and Request addressed to W. R. Castle, Esq., to hear and determine the case;
- 4 Order and Request addressed to L. A. Thurston, Esq., to hear and determine the case;
- 5 Clerk's Minutes of the Supreme Court, dated June 19 and 20, 1896;
- 6 Motion by plaintiffs for rehearing, annexed thereto are the affidavits of L. A. Thurston and S. M. Ballou;
- 7 Order and Request addressed to Paul Neumann, Esq., to heard and determine the case;
- 8 Second Order and Request addressed to W. R. Castle, Esq., to hear and determine the case;
- 9 Clerk's Minutes of the Supreme Court, dated April 9, 1897, and
- 10 Decision of the Supreme Court rendered May 4, 1897.

—are full, true and correct copies of the originals thereof which are now on file in the Clerk's Office of said Supreme Court in the foregoing entitled cause.

[163—107]

Witness my hand and the Seal of said Supreme Court of the Territory of Hawaii, at Honolulu, Oahu,

this 12th day of November, A. D. 1909.

[Seal] /S/ JAMES A. THOMPSON,
Clerk Supreme Court, Territory of Hawaii.
[164—108]

**Exhibit No. 3—Transcript of Record in Cause
Entitled George Ii Brown et al. vs. Charles A.
Brown et al. in the Circuit Court of the First
Judicial Circuit, Territory of Hawaii.**

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

EQUITY NO. 1324.

GEORGE II BROWN and FRANCIS HYDE
BROWN, Minors, by Their Next Friend,
ALBERT F. JUDD

vs.

CHARLES A. BROWN, JOHN A. MAGOON and
IRENE II HOLLOWAY.

TRANSCRIPT OF RECORD. [165—109]

In the First Judicial Circuit, Territory of Hawaii.

At Chambers.—IN EQUITY.

(\$2 Stamps)

GEORGE II BROWN, and FRANCIS HYDE
BROWN, Minors, by Their Next Friend,
ALBERT F. JUDD,

Plaintiffs,

vs.

CHARLES A. BROWN, JOHN A. MAGOON and
IRENE II HOLLOWAY,

Defendants.

Bill of Complaint.

**BILL TO DECLARE A TRUST AND FOR
RELIEF.**

To the Honorable, the Presiding Judge of the First
Judicial Circuit:

The Bill of Complaint of George Ii Brown and Francis Hyde Brown, of Honolulu, in the Island of Oahu, of the Territory of Hawaii, minors, by the Next Friend, Albert F. Judd, of said Honolulu, respectfully shows as follows, viz.:

1. That on the 2d day of May, A. D. 1870, John Ii, late of said Honolulu, died seized and possessed in fee of certain lands and personal property hereinafter mentioned, leaving a last will and testament, which was admitted to probate on the 10th day of June, A. D. 1870, as and for the last will and testament of said John Ii, before a Justice of the Supreme Court of the Kingdom of the Hawaiian Islands, sitting in Probate, a copy of which will, with a translation thereof, is hereto appended as a part hereof and to the original whereof the plaintiffs, for greater certainty, crave leave to refer; the lands herein referred to being mentioned in said will.

2. That in and by said last will and testament, the same being written in the Hawaiian language, it was declared and directed by the said testator that if his daughter Irene, who is now wife of C. S. Holloway, of said Honolulu, and one of the defendants hereto, should die having borne children, then the [168—112] said property should descent to her children, but that she, the said Irene, should be his

first heir, meaning and intending thereby that during her lifetime she should have the use and benefit of said property, and that her children, by virtue of said will, are the absolute owners in fee of said property, subject only to their said mother's life estate.

3. That on the 30th day of September, 1886, the said Irene was married to Charles A. Brown, of said Honolulu, one of the defendants hereto, and that the plaintiffs, the said George Ii Brown and Francis Hyde Brown, of the respective ages of fifteen and ten years, are the children of said Irene and of said defendant Charles A. Brown, and are now living with the said Irene.

4. That, as will appear by the records of the courts, when produced, and to which, for greater certainty, the plaintiffs crave leave to refer, on the 7th day of April, A. D. 1894, a bill in equity was filed in the Circuit Court of the First Circuit of the Republic of Hawaii against the said Charles A. Brown, as defendant, by the said Irene, being then the wife of said defendant, and by her said children, by the next friend, A. F. Judd, and the said A. F. Judd and Sanford B. Dole, as executors under said will of the said John Ii, the said Judd being one of the persons appointed as one of the executors by the said testator in his said will, and the said Dole having been appointed by the Court to succeed J. Komoikehue, deceased, named in said will as one of the executors thereof, in which said bill it was claimed by the said Judd that under the said will of the said John Ii, he was made trustee of said property during the lifetime of said Irene, and also that the said [169—113]

defendant Charles A. Brown had taken charge of the said property and refused to allow him, the said Judd, to take possession thereof, or to manage or control it, or to pay over any of the income thereof, to his said wife Irene, or to account to him, the said Judd, or to anyone therefor, and that he had wasted and squandered and mismanaged the said property and incurred liabilities which he was illegally seeking to make a charge upon the said estate, and had failed to make provision for his said wife Irene, or any settlement upon her, and that she had no means of support except from said estate; the object of said bill being to obtain a construction of said will to establish the respective rights of said children and of said Irene and of said defendant in said property and its income, and that said defendant be required to account for the income received by him therefrom and decreed to hold said estate in trust for the uses and purposes named in the said will, and that said Judd be reinstated as trustee thereof and the said defendant ordered to deliver possession and control thereof to him.

That on the filing of said bill process of court issued and the said defendant appeared before Cooper, J., at Chambers, then a judge of said Circuit Court, and after sundry proceedings interposed by said defendant, said Cooper, J., on August 1, 1894, allowed the plaintiffs to amend their said bill, "the amendment to be such as to limit the question to the construction of the will of the late John II," and such amended bill was filed accordingly, and the said defendant filed his answer to said bill, and upon Octo-

ber 24, 1894, before said Cooper, J., at Chambers, the said cause came on for hearing, when counsel appeared for the plaintiffs and also for the said defendant, and on the issues presented by said bill and answer and the evidence therewith presented, argument was made and the case [170—114] submitted, but no decision or decree was made therein by said Cooper, J., who afterwards resigned his position as said Circuit Judge and declined thereafter to decide the said cause.

That April 16, 1896, A. Perry, then second Judge of said Circuit, signed a paper in said cause entitled "Reserved Questions of Law," and setting forth that "the following questions of law in the above-entitled case are hereby reserved for consideration in the Supreme Court under Chapter 57, Section 72, Laws of 1892," specifying, among other questions, the question whether a trust, if created in the property devised to Irene Ii by the will of her father, John Ii, was still in force,—Irene having married, attained majority and had issue of said marriage,—which issue still survived, and that the said paper was filed in the Circuit Court of the Republic of Hawaii.

That in June, 1896, was filed in the Supreme Court of Hawaii a paper reading as follows:

"To W. R. Castle, Esq.

Sir:

Chief Justice Judd and Justice Frear being disqualified to sit in the above entitled case, I, the remaining Justice of the Supreme Court, hereby request and authorize you to sit with me in hearing

and determining the said case.

(Signed) W. AUSTIN WHITING."

—together with another similar paper addressed to L. A. Thurston.

That said reserved questions of law were argued in said Supreme Court before Whiting, J., W. R. Castle, Esq., and L. A. Thurston, Esq., by Kinney & Ballou, for plaintiffs, and Magoon & Edings, for defendant, but no decision was given by the court as so constituted.

That on the affidavit of said Thurston filed in said Supreme Court, January 29, 1897, stating that he was about to leave for the United States and could not give proper consideration to the case, and declined to join in an opinion, and [171—115] requested leave to withdraw and that another justice be appointed in his stead,—and on another affidavit then filed by S. M. Ballou, that the case had become one of great urgency for reasons stated, and on motion by Kinney & Ballou, attorneys for plaintiffs, requesting a rehearing with the substitution of another judge in the place of Thurston, a paper was filed in said Supreme Court, April —, 1897, addressed to Paul Newmann, and worded precisely like the former above-mentioned requests, and on the same day a similar request to W. R. Castle was filed.

That April 9, 1897, at a hearing before the Supreme Court, in vacation, before Whiting, J., Castle and Newman, on said reserved questions of law, Kinney & Ballou appeared for plaintiffs, and Magoon and Edings for defendant, and that on May 4, 1897,

an opinion by said Supreme Court, organized as aforesaid, was filed, in which opinion the court said that "the court decides that upon the marriage and attaining majority of the devisee the trust became extinct," and thereupon went on to say that "the court concludes that Irene Haalou Ii Brown has an estate in fee simple in the property devised to her by her father's will." The said court also in said opinion, says that "though it has consented to try the questions reserved in this cause, does not wish to establish thereby a precedent for reserving questions in a cause in equity."

That no decree has been made, filed or entered in any of the aforesaid proceedings in equity.

That in none of the said proceedings did the said children, although having interests thereby affected conflicting with the interests of the said Irene, their mother, have separate attorneys or counsel, but that the same attorneys and counsel appeared therein for and represented said children and their said mother.

Wherefore, and by reason whereof, the plaintiff's claim and [172—116] submit that no legal adjudication has been made of said questions of law and that no court which was organized, as required by the constitution of the Republic of Hawaii, obtained appellate jurisdiction of any of the said reserved questions of law;

That the jurisdiction of said Supreme Court, concerning the construction of said will (if it ever existed), ended upon its determining that no trust was in existence concerning said property; that all matters of law arising in said cause before said Cooper,

J., and pending before him, were required by law to be decided by him and by no other court or judge, and the same not having been decided by said Cooper, J., were not lawfully presented to or decided by any other court or judge;

That there was no statutory or other authority to reserve questions of law in said cause for the opinion thereon of the Supreme Court, and that said reserved questions of law did not lawfully or properly come before said Supreme Court.

Wherefore, said Supreme Court had no jurisdiction thereof.

And the plaintiffs further claim and submit, that said Whiting, J., as a judge of the said Supreme Court, had no constitutional right or authority to request or authorize the said Castle and Thurston to sit with him as Justices of the Supreme Court in the places of two disqualified justices thereof;

That after the said Supreme Court composed of said Whiting, J., and of said Castle and Thurston, had heard argument of said Reserved questions of law and taken the same under consideration, a new court to rehear said argument and decide said questions, upon said Thurston declining to join in an opinion thereon, could not be and was not lawfully organized.

5. And the plaintiffs further aver that upon July 2, 1897, the said Irene joined the defendant Charles A. Brown in executing a deed of conveyances of said property, a copy whereof [173—117] is hereto appended and made a part hereof, to a trustee, upon trust that the trustee convey the same to a corpora-

tion or joint stock company to be organized, one-third of the shares of the capital stock of such corporation to be given to said defendant Charles A. Brown, one-third thereof to her said children, and the other one-third thereof to herself, with articles of association of such corporation or joint stock company whereby the sole control and management of said property would be given to and kept by said defendant Charles A. Brown, and that no change or amendment of such articles should be made except by the owners of not less than three-fourths of the shares of the capital stock of such corporation. That the said property was conveyed to a corporation or joint stock company known as the John Ii Estate, Limited, which was organized under articles of association providing as above mentioned, and that shares were issued by said company as provided in said articles of association. That one-third, or 500 shares of the capital stock of said Company are now held by the defendant Irene in the name of Alfred W. Carter, but for the use and subject to the order and direction of the defendant Irene; one-third thereof, or 500 shares, by said Alfred W. Carter, as trustee, for her said children; and one-third thereof, or 500 shares, by the said defendant Charles A. Brown, except as to one share thereof, which the said defendant Charles A. Brown caused to be issued in the name of John A. Magoon, of said Honolulu, one of the defendants hereto, who holds the same, as plaintiffs are informed and believe, and so aver upon their information and belief, solely for the use and benefit of said defendant Charles A. Brown.

6. That upon the 27th day of May, A. D. 1898, the said Irene was granted an absolute divorce from said defendant Charles A. Brown. [174—118]

And the plaintiffs further claim and submit that by reason of the premises the said defendants, and each of them, hold said shares subject to a trust that upon said Irene's death, said shares be assigned to the plaintiffs.

And the plaintiffs say that there is danger, and that they fear and have reason to fear, that unless restrained from so doing by a restraining order issued by this Honorable Court, the said defendants, Brown and Magoon may, pending this cause, sell and dispose of or pledge the 500 shares held by them as aforesaid:

WHEREFORE, plaintiffs pray as follows:

1. That process do issue summoning the defendants to appear and answer hereunto and that they be bound by the proceedings to be had herein;

2. That your Honor do order and decree that the said defendants assign the said one thousand shares (held by them as aforesaid) to a trustee, in trust as to 500 shares, to pay the income thereof to said Irene, and as to another 500 shares, to pay the income thereof to the defendant Charles A. Brown, during the life of the said Irene, and at her death, to assign all of the said shares to the plaintiffs absolutely;

3. That the defendants Brown and Magoon, and each of them be joined and directed by a restraining order directing them not to sell, pledge or otherwise dispose of the said 500 shares held by them as afore-

said, until further order, and that such restraining order be issued together with said process; and,

4. For such other, further and appropriate relief, orders and decrees, as the nature of the case may require.

And the plaintiffs will ever pray, etc.

GEORGE H BROWN,

FRANCIS HYDE BROWN,

By Their Next Friend,

ALBERT F. JUDD.

ALFRED S. HARTWELL,

Of Counsel. [175—119]

Territory of Hawaii,

Honolulu,

Island of Oahu,—ss.

Personally appeared the above named Albert F. Judd, who on oath deposeth and says: That the matters and things stated and set forth in the foregoing Bill of Complaint are true, save as to those things therein stated on information and belief, and as to those he believes it to be true.

ALBERT F. JUDD.

Subscribed and sworn to before me this 27 day of January, A. D. 1903.

GEORGE LUCAS,

Clerk. [176—120]

Imua o ke Mana Loa Amene. Owau o Ioane Ii no ke kulanakauhale o Honolulu Mokupuni Oahu ko Hawaii Pae Aina, ua hana au, a ke hana nei i kau palapala kauoha hooilina, i mea e hoike aku ai ma ke akea, no ka mea, o ka'u kauoha hope loa keia a

mahope o ka hookaa ana i ko'u mau aie apau, e ili aku no kuu mau waiwai paa apau loa a me ko'u mau waiwai lewa apau loa i kuu mau hooilina i hoike ia malalo nei penei:

Akahi. O Airine Haalou Ii, kuu kaikamahine pono i ka hooilina mau penei; O ka aina o Halaape, Kohala, Mokupuni o Hawaii, O ka aina o Waipunaulaiki, Kona Hema, Hawaii. Aina hooilina Heneri-aka Kaleemakalii o Aleemai, Hana, Mokupuni o Maui. Elua Apana Aina Kapunakea, Lahaina, Maui. Akahi Loi iloko o Uhao, Lahaina, Maui. Akahi Ahupuaa o Keopukapaiole i Molokai.

Ma ka Mokupuni Oahu. Hookahi Ili aina iloko o Makiki o Kancialole ke kumu ia o ka wai a hiki i kai o Pawaa. Akahi Pa hale i Kamakela, Honolulu. Akahi kuleana i Waiakenei, Honolulu. Akahi kuleana Paakiko, Maemae, Honolulu. Akahi Ahupuaa o Waipio i Ewa a me Akahi kuleana no Kekela (w) i make a ua lilo ia'u. Aia ma Kee, Haena, Mokupuni o Kauai ame ka hapalua o na waiwai lewa apau.

Elua. O kuu wahine mare o Maraca Ii ka lua o ka hooilina. Akahi aina ma Hilo oia ke kuleana o Lumaina i lilo ia'u make kuai. Hookahi Ili aina o Makana, i Koolauloa, Oahu, ame ka hapalua o na waiwai lewa apau, a ina mare oia i ke kane hoi hou no keia mau aina no kuu kaikamahine, aole hiki iaia ke hooili aku ia hai.

Ekolu. O kuu kaikaina o J. Komoikehuehu ke kolu o na hooilina. Akahi Ili aina o Homaikaia iloko o Waipio me Akahi aina kuai o ka hapalua o Aniole i Waikele, Ewa, Oahu, ame Akahi Ili aina o

Kaluapulu, Kalihi, Oahu, oia kona mau aina a'u e hooilina nei. [177—121]

Eha. O ko'u kuleana iloko o ka aina o G. Naaihelu kuu kaikaina i make e pili no ia i kana wahine ia Kamealani.

Elima. O kuu aina kuai oia ka Pa i Pawaa e pili la no me ka Pa o Kauka ma ka aoao ma Waikiki o ke Alanui Aupuni e holo la i Waikiki Kai no A. F. Judd is Pa oia kona aina a'u e hooili nei.

Ma keia Palapala kauoha a'u ua hoono ho aku au a ke hoono ho nei ia J. Komoikehuchuu, A. F. Judd o laua elua na hooko kauoha o'u a mau luna hooponopono waiwai a he mau kahu no ke kino ame ka waiwai o kuu kaikamahine ka hooilina mua i hoike ia ma keia palapala o no loa apau o na aina i hoolimalima ia, a me na loa e ae maluna o na a ina apau o kuu kaikamahine, me laua wale no ka malama a hiki i kona wa e kanaka makua ai, a hanau paha kana mau keiki, o laua no na hooko kauoha i ka wa e ola ana kuu kaikamahine, a i kana mau keiki aku, Elike me kuu makemake i hoike ia ma keia palapala, a e loa no ia laua ka uku Elike me ke Kanawai.

A na o'u mau hooko kauoha e hoono ho i kuu kaikamahine ma kahi kupono e ao ia ika naauao ma na olelo Elua, a e alakai ia ka'u keiki ma ke alanui o ka pono, a o na hua mua e loa mai e lawe ia he umi keneta no kela keia dala apau a he dala hoolaa ia no ko ke Akua Aupuni; Elike me ka'u mau hana ana, a e hooko i keia na hooko kauoha o'u.

Eia hoi ina make kuu kaikamahine, a ua hanau keike oia, alaila e ili aku no ka waiwai i kana mau keiki, a ina ua make me ke keiki ole, alaila e ili aku

no i kona makuahine pono i a ina e make ia e ili hou aku i kuu kaikaina ia J. Komoikehuchu.

I hoike no ka oiaio o keia ke kakau nei au i kuu inoa me kuulima iho, a hoo hoopili mai i kuu sila i kela la 28 Aparila N. H. 1870.

Kona

IOANE II X

kaha

[178—122]

Mamuli o ke noi ana mai a ka mea Hanohano Ioane Ii, ia makou i mau hoike o kona kakauinoa ana i kana palapala kauoha hope loa, a ua kakau makou i ko makou mau inoa i mua ona.

D. B. MAHOE no Honolulu.

A. KAHANU “ “

W. L. MOEHONUA “ “

[179—123]

(TRANSLATION OF THE WILL OF JOHN II BY
B. L. WILCOX.)

Before Almighty God, Amen. I, John Ii, of the City of Honolulu, Island of Oahu, Hawaiian Islands, have made and am now making my will and do declare publicly that this is my last will and testament.

After paying all my debts all my property both real and personal shall descend to my heirs who are mentioned below as follows:

First. Irene Haalou Ii, my own daughter is the first heir as follows:

The land of Halaape, Kohala, Island of Hawaii.

The land of Waipunaui, South Kona, Hawaii.

The land bequeathed by Henrietta Kaleemakalii called “Aleemai,” Hana, Island of Maui.

Two pieces of land, Kapunakea, Lahaina, Maui.

One loi in Uhao, Lahaina, Maui.

One Ahupuaa Keopukapaeole in Molokai.

On the Island of Oahu. One iliaina at Makiki Kaneialole the source of water down to Pawaa. One house lot in Kamakela in Honolulu. One kuleana in Waiakemi in Honolulu. One kuleana Paakiki Maemae. One Ahupuaa of Waipio in Ewa and one kuleana of Kekela (w) deceased now belonging to me at Kee, Haena, Island of Kauai. And one half of all my personal property.

Second. My wife Maraea Ii is my second heir. One land in Hilo being the kuleana of Laumania purchased by me. One iliaina Makana in Koolauloa, Oahu, and one half of all my personal property; and in case my wife marries again this land shall descend to my daughter; she cannot bequeath to anyone.

Third. My kaikaina, J. Konoikehuehu is the third heir. One iliaina Homaikaia in Waipio, Ewa, Oahu, and one deeded land the half of Auiole at Waikele, Ewa, Oahu, and one iliaina [180—124] Kaluapulu, Kalihi, Oahu; those are the lands I bequeath to him.

Fourth. My interest in the land of G. Naaihehu, my deceased younger brother, is for his widow Kamealani.

Fifth. My land which I bought being the lot at Pawaa, adjoining Dr. Judd's land on the Waikiki side of the road leading to Waikiki is for A. F. Judd, and that is his land that I bequeath to him.

By this will I have appointed and I do hereby appoint J. Komokeehuehu, A. F. Judd, they two to be

the executors and guardians of the persons and property of my daughter the first devisee mentioned in this paper.

All receipts from the lands that are leased and all other receipts from all the lands of my daughter they two alone shall have the sole care of it until she becomes of age or bears children; they two shall be the executors during the lifetime of my daughter and are such after her in accordance with my wishes as expressed in this paper, and they two shall receive compensation the same as provided by law.

My executors shall place my daughter in some suitable place where she may be educated in both languages, and my child must be brought up in the path of rectitude, and the first fruits received, from the lands of my daughter, that is, the money received, there shall be taken therefrom ten cents from each dollar which is set apart as an offering to God's Kingdom the same as I have done. And my executors are to carry out this request of mine.

And further if my daughter should die having borne children then the property shall descend to her children and if she should die without children the property shall descend to her own mother and if she should be dead then the property shall descend to my brother J. K. Komoikeehuehu. [181—125]

In witness of the truth of this I have hereunto signed my name with my own hand and affixed my seal this 28th day of April, A. D. 1870.

his

IOANE II X

mark.

Exhibit "A."

THIS INDENTURE made this 2nd day of July, 1897, between Irene Ii Brown, of Honolulu, Oahu, party of the first part, C. A. Brown, her husband, of said Honolulu, party of the second part, and Henry Holmes, of said Honolulu, hereinafter designated the Trustee, party of the third part.

WITNESSETH: That the said parties of the first and second parts in consideration of One Dollar to each of them paid by the said party of the third part the receipt whereof is hereby acknowledged, hereby give, grant, bargain, sell and convey unto the said party of the third part and his heirs:

All and singular the lands situate in the Hawaiian Islands belonging to the parties of the first and second part or either of them and all their right, title and interest, whether by curtesy, dower or otherwise in and to the lands of each other situate in the Hawaiian Islands together with the partnership agreement dated the 6th day of September, 1893, between the party of the second part and Lincoln McCandless, also all contracts and agreements whether by lease or otherwise relating to the said lands; also all live stock belonging to the said parties of the first and second parts or either of them in the Hawaiian Islands; and also all mortgages and notes secured by mortgage held by the parties of the first and second parts or either of them.

TO HAVE AND TO HOLD the said lands and hereditaments unto the said Henry Holmes, his heirs, successors in trust and assigns forever, and the other said property unto the said Henry Holmes, his execu-

tors, administrators, successors in trust and assigns forever upon the following trusts: That is to say:

To convey all the said property to the corporation to be [183—127] formed as hereinafter mentioned for the only proper use and behoof of the said corporation.

To forthwith form a corporation under the laws of the Republic of Hawaii having a limited liability upon and subject to the following terms and conditions:

First: Said corporation shall be incorporated by the following named parties, Irene Ii Brown, Charles A. Brown, Henry Holmes, S. M. Ballou and J. Alfred Magoon unless any one or more of them shall die, refuse to act or become incapacitated from acting in which case a substitute for the said S. M. Ballou may be named by the said Irene Ii Brown, a substitute for the said J. Alfred Magoon may be named by the said C. A. Brown and a substitute for any of the others may be named by a majority of those who shall act in and in case the parties nominating shall be equally divided then, and in such case, such substitute may be named by the party of the third part.

Second: The capital stock of said corporation shall be One Hundred and Fifty Thousand Dollars (\$150,000) divided into one thousand five hundred shares of a par value of One Hundred Dollars (\$100) each and shall be distributed as follows:

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Charles A. Brown	499	shares
Henry Holmes, Trustee for George Ii Brown and Francis Hyde Brown	499	“
Henry Holmes, Trustee for Irene Ii Brown	499	“
J. Alfred Magoon	1	“
S. M. Ballou	1	“
Henry Holmes	1	“
<hr/>		
Total,	1,000	“

Third: The name of the corporation shall be
“John Ii Estate, Limited.”

Fourth: The objects of the Company shall be as
follows:

1. To manage the property as a whole. [184—
128]
2. To farm and (or) cultivate any portion of the
lands suitable for the purpose.
3. To lease any portion of the lands for any term
receiving payment therefor in produce or otherwise.
4. To divide into house lots any portion of said
land and to sell or lease the same.
5. To carry on the businesses of ranching, butcher-
ing and (or) forestry.
6. To advance money on mortgage of lands, pro-
duce or any real or personal property.
7. To improve any of the lands of the said cor-
poration in any manner whatsoever.
8. To carry on any of the aforesaid businesses
either solely or jointly with any persons or other cor-
porations.

Fifth: The officers of said corporation shall consist of a President, First Vice-President, Second Vice-President, Treasurer, Secretary and Auditor. The officers other than the Auditor shall be the Directors of the Company.

Sixth: The said Henry Holmes shall be appointed President of the Company; the said J. Alfred Magoon, First Vice-President; the said Irene Ii Brown, Second Vice-President; the said C. A. Brown, Treasurer and Manager; and the said S. M. Ballou, Secretary. The Auditor shall be appointed at the first meeting of the share holders after incorporation.

Seventh: The officers and directors shall continue to hold office for one year and thereafter until their successors are appointed.

Eighth: The future officers of the Company other than the Auditor shall be appointed by the shareholders representing not less than three-fourths of all the shares of the Company.

Ninth: The Auditor need not be a shareholder of the Company; he shall be appointed by shareholders representing a [185—129] majority of all the shares of the Company.

Tenth: The Company shall have power to buy and hold shares of stock in the Company or in any other corporation whether the shares of said last mentioned corporation are fully paid up or only partially paid up; and also to buy any of the same shares for its own use and not on commission; also to buy, sell, lease, mortgage, exchange and otherwise manage any real and personal estate at any time owned by the corporation or any easement or rights in connection

with such real estate but no real estate belonging to the Company shall be mortgaged, conveyed or sold except by a vote of a majority of the Directors of the Company.

Eleventh: The treasurer and Manager of the Company shall have power from time to time to sell, in the way of trade, personal property of the corporation and to grant leases for a term not exceeding five (5) years of any land of a less annual value than Two Hundred and Fifty Dollars (\$250).

Twelfth: The salary of the Treasurer and Manager shall be fixed by the Directors. So long as the said C. A. Brown shall act as Treasurer and Manager he shall be paid a salary of not less than Fifty Dollars (\$50) nor more than One Hundred Dollars (\$100) per month while any of the debts specified shall be unpaid and after the payment of all said debts the said C. A. Brown so long as he shall be Treasurer and Manager shall be paid a salary equivalent to seven and one-half per cent ($7\frac{1}{2}\%$) on all rents and income from the lands and other property and on all gross profits other than rents and income, for his management.

Thirteenth: Until incorporation the said C. A. Brown shall have the management of the Estate.

Fourteenth: The Company shall be liable for and the property shall be conveyed to the corporation subject to the [186—130] debts mentioned in the schedule hereunder annexed and for any other debts of the parties of the first and second parts that all the parties hereto shall determine before the incorporation of the Company and the profits of the corpora-

tion over Six Thousand Dollars (\$6,000) per annum shall be applied to the payment of such debts.

Fifteenth: All other terms and conditions of said corporation not herein specified shall be in the absolute discretion of the parties of the first and second parts jointly as expressed in writing hereafter signed by them both and in default of such expression then in the absolute discretion of the party of the third part and the said S. M. Ballou and said J. Alfred Magoon or a majority of them.

Sixteenth: The five hundred (500) shares of the capital stock of the Oahu Sugar Company subscribed for by the said C. A. Brown and the calls for which are a debt to be paid by the corporation shall be issued one-half or two hundred and fifty (250) shares to and in the name of said Irene Ii Brown and one-half or two hundred and fifty (250) shares to and in the name of said C. A. Brown.

IT IS HEREBY EXPRESSLY agreed and declared that in case of the failure to incorporate within one year of the date hereof for any cause whatever this deed shall be void.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands and seals the day and year first before written.

(Sig.) IRENE II BROWN.

“ C. A. BROWN.

“ HENRY HOLMES.

[187—131]

Hawaiian Islands,
Island of Oahu,—ss.

On this 2d day of July, 1897, personally appeared

before me Irene Ii Brown and C. A. Brown, her husband, and Henry Holmes, to me known and known to me to be the persons described in and who executed the foregoing instrument and severally acknowledged that they executed the same freely and voluntarily for the uses and purposes therein set forth. And said Irene Ii Brown on an examination separate and apart from C. A. Brown acknowledged that she executed the same freely without fear or compulsion of her said husband.

[Seal] (Sig.) DOROTHEA LAMB,
Notary Public.

[Endorsed]: No. ——. In the First Judicial Circuit, Territory of Hawaii. George Ii Brown and Francis Hyde Brown, Minors, by their Next Friend, Albert F. Judd, Plaintiffs, vs. Charles A. Brown, John A. Magoon and Irene Ii Holloway, Defendants. Bill to Declare a Trust and for Relief. Rec'd. \$37. Filed Jan. 27, 1903. Geo. Lucas, Clerk. Alfred S. Hartwell, Attorney for Plaintiff. Stangenwald Bldg., Honolulu. [188—132]

The following orders are written on the left-hand margin of the first page of the bill:

Orders Written on Bill of Complaint.

Albert F. Judd is hereby appointed as next friend for George Ii Brown and Francis Hyde Brown, minors and plaintiffs herein to prosecute this suit as such and protect their rights.

Jan. 27, 1903.

(Sgd.) J. T. DE BOLT,
1st Judge.

Let process issue as prayed for upon an approved bond in the sum of \$500 being filed.

Jan. 27, 1903.

(Sgd.) J. T. DE BOLT,

1st Judge. [189—132a]

In the Circuit Court of the First Circuit, Territory of Hawaii.

At Chambers.

(\$2.00, Stamps)

GEORGE II BROWN & FRANCIS H. BROWN,
by Their Next Friend ALBERT F. JUDD,

vs.

CHARLES A. BROWN et al.

Summons.

CHAMBER SUMMONS.

The Territory of Hawaii:

To the High Sheriff of the Territory of Hawaii, or
His Deputy, the Sheriff of the Island of Oahu,
or His Deputy:

You are commanded to summon Charles A. Brown,
John A. Magoon and Irene Ii Holloway,

.
to appear ten days after service hereof, if they re-
side on the Island of Oahu otherwise twenty days
after service, before such Judge of the Circuit Court
of the First Circuit as shall be sitting at Chambers
in the Court Room at the Judiciary Building in
Honolulu

.
to answer the annexed Bill to Declare a Trust & for

184 *The John Ii Estate, Limited, et al.*

Relief of G. Ii Brown & F. H. Brown, Minors, by
their next Friend Albert F. Judd.

And you are further commanded, by order of Hon.
..... Judge of the Circuit Court
of the..... Circuit.....
.....
.....

And have you then there this Writ with full return
of your proceedings thereon. [190—133]

WITNESS the First Judge of the Circuit Court
of the First Circuit at Honolulu this 27th day of Jan-
uary, 1903.

[Seal]

(Signed) GEORGE LUCAS,
Clerk.

(§1166 Civil Code,—“The time within which an
act is to be done—shall be computed by excluding the
first day and including the last. If the last day be
Sunday, it shall be excluded.”)

[Endorsed]: E. 1324. 20/425. Circuit Court
First Circuit. George Ii Brown & Francis H. Brown
by A. F. Judd vs. C. A. Brown, et al. Chambers
Summons. Issued at 4:20 o'clock P. M. Jan. 27,
1903. George Lucas, Clerk. Returned at 2:30
o'clock P. M. January 28, 1903. J. A. Thompson,
Clerk.

.....Service	at \$1.00 each	\$.....
.....Cop	at \$1.50 each
Expense.....	
Total,		\$.....

Served this Summons as follows: On Charles A.
Brown and John A. Magoon, at Honolulu, Oahu, the
27th day of January, A. D. 1903, and on Irene Ii

Holloway, at Honolulu, Oahu, the 28th day of January, A. D. 1903, by delivering to each of them a certified copy hereof, and of the Petition hereto annexed, and at the same time showing them the original as directed.

Dated January 28, 1903.

ALBERT McGURN,

Deputy Sheriff. [191—134]

E. 1324.

*In the Circuit Court of the First Circuit, Territory
of Hawaii.*

IN EQUITY.

At Chambers.

GEORGE II BROWN and FRANCIS HYDE
BROWN, Minors, by Their Next Friend,
ALBERT F. JUDD,

vs.

CHARLES A. BROWN, JOHN A. MAGOON and
IRENE II HOLLOWAY.

Answer of Irene Ii Holloway.

BILL TO DECLARE A TRUST, ETC.

Now comes Irene Ii Holloway, one of the defendants in the above-entitled cause, and for answer to the Bill of Complaint of the said George Ii Brown and Francis Hyde Brown, alleges as follows:

1.

That she admits the allegations contained in paragraphs 1, 3, 4, and 6 of said bill of complaint.

2.

That she admits the allegations contained in para-

graph 2 of said bill of complaint except the allegation that the said John Ii meant and intended by his said last will that this defendant should have the use and benefit of said property during her lifetime only. And she alleges that she was given in and by said will the said property in fee simple.

3.

That she admits the allegations contained in paragraph 5 of said bill of complaint except the allegation that the articles of association therein referred to should or do provide that the sole control and management of the property conveyed to said corporation should be given to and kept by said Charles A. Brown. [192—135]

4.

That she denies all allegations in said bill of complaint contained which are not herein admitted.

WHEREFORE, this defendant prays that she may be hence dismissed and that she have her costs in this behalf sustained.

Dated, Honolulu, January 31, 1903.

IRENE II HOLLOWAY.

ROBERTSON & WILDER,

Attorneys for Irene Ii Holloway.

Territory of Hawaii,

Island of Oahu,—ss.

Irene Ii Holloway being duly sworn says that the allegations contained in the foregoing answer are true.

IRENE II HOLLOWAY.

Subscribed and sworn to before me this 31st day of
January, A. D. 1903.

[Seal]

N. FERNANDEZ,
Notary Public.

[Endorsed]: E. 1324. Circuit Court, First Circuit.
In Equity. George II Brown et al. vs. Charles A.
Brown et al. Bill to Declare a Trust, etc. Answer
of Irene Holloway, One of the Defendants Herein.
Received \$——. Filed Jan. 31, 1903. J. A. Thomp-
son, Clerk. Robertson & Wilder, Attys. for Irene
Holloway, Honolulu. [193—136]

In the First Judicial Circuit, Territory of Hawaii.

EQUITY No. 1324.

At Chambers.

GEORGE II BROWN and FRANCIS HYDE
BROWN, Minors, by Their Next Friend,
ALBERT F. JUDD,

Plaintiffs,

vs.

CHARLES A. BROWN, JOHN A. MAGOON, and
IRENE II HOLLOWAY,

Defendants.

Demurrer of Charles A. Brown.

**BILL TO DECLARE A TRUST AND FOR
RELIEF.**

**THE DEMURRER OF CHARLES A. BROWN,
ONE OF THE ABOVE NAMED DEFEND-
ANTS, TO THE BILL OF COMPLAINT OF
GEORGE II BROWN AND FRANCIS**

HYDE BROWN, MINORS, BY THEIR
NEXT FRIEND, ALBERT F. JUDD.

This defendant, by protestation, not confessing any or all of the matters and things in the plaintiffs' bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to said bill, and for cause of demurrer shows:

1. That the matters set forth in the first and second paragraphs of said bill have been heretofore adjudicated between the said parties and a judgment made and entered adversely to the contention of said plaintiffs.

2. That it appears in and by said bill that there is another suit pending in this court between said parties involving the construction of the will set forth and referred to in the first and second paragraphs of said bill of complaint, in which said suit all necessary proceedings have been taken save alone the formal entry of a decree.

3. That it appears on the face of said bill of complaint that the plaintiffs have no right, title, interest or estate in and to any of the property described or referred to in said bill. [194—137]

4. That it does not appear by the said bill in what land or property, if any, the plaintiffs claims to have an interest.

5. That it appears that the plaintiffs do not claim to have any estate in the property referred to by them in their said bill of which they have any right of present enjoyment.

6. That it appears in and by said bill that this

defendant is the sole lawful owner of four hundred ninety-nine shares of the stock referred to in said bill without any estate in remainder or other right, title or interest whatever in said plaintiffs.

7. That it appears by said bill that the plaintiffs have no present vested interest or estate in the property referred to in their said bill (assuming that there is any property referred to with certainty in said bill) such as requires protection by any relief that may be given in a court of equity.

8. That it does not appear by said bill that the estate claimed for the plaintiffs in the property, if any, referred to by them, is in any way jeopardized or endangered by any of the matters or things stated in said bill.

9. That it appears by said bill that said Irene Ii Holloway, one of the defendants, had a freehold estate in all of the property conveyed by her to said corporation; and that this defendant was the owner of certain other property and interests conveyed to said corporation; and it does not appear that any of the property or estate of the plaintiffs' was conveyed to said corporation either by them or by any person purporting to act in their behalf.

10. That it appears that the bill is multifarious in this that it joins the defendant Irene Ii Holloway together with this defendant and the defendant John A. Magoon as parties to the cause when it appears that each of said defendants claim title to distinct and separate shares of stock in said corporation.

[195—138]

11. That it appears by the allegations of said

bill that one thousand of the fifteen hundred shares of the capital stock of the corporation known as "The John Ii Estate, Limited," is held by one Alfred W. Carter, as trustee for the defendant Irene Ii Holloway and for the plaintiffs, to wit, five hundred shares for each said Irene Ii Holloway and said plaintiffs, and yet said Alfred W. Carter is not made a party to this cause, in which respect defendant submits that there is a fatal defect of parties to this cause.

12. That it appears from the bill, as matter of law, that the plaintiffs have no right, title or interest in or to any of the shares of stock of this defendant, the transfer of which is sought to be enjoined by them.

13. That it further appears upon the face of said bill that the defendants, if they have any interest or estate in said land, may when the proper time arrives therefor assert the same in an action at law; and it appears further that any proceedings at this time are premature.

14. That it appears that the plaintiffs' said bill of complaint, in case the same were true, which this defendant does in nowise admit, contains no matter of equity whereon this Court can ground a decree or give the complainant any relief or assistance as against this defendant.

WHEREFORE this defendant demurs to said bill and to all matters and things therein contained and prays the judgment of this Honorable Court whether he shall be compelled to make any further or other answer thereto; and prays to be hence dismissed with

his costs in this behalf expended.

J. ALFRED MAGOON,
HATCH & SILLIMAN,

Solicitors for Defendant, Charles A. Brown.

[196—139]

We certify that the foregoing Demurrer is not intended for purposes of delay.

HATCH & SILLIMAN,

Solicitors for Defendant, Charles A. Brown.

[Endorsed]: Equity No. 1324. Circuit Court, First Circuit, Territory of Hawaii. George Ii Brown and Francis Hyde Brown, Minors, by their next Friend, Albert F. Judd, Plaintiffs, vs. Charles A. Brown, John A. Magoon and Irene Ii Holloway, Defendants. Demurrer of the Defendant Charles A. Brown. Received and filed Feb. 9, 1903. J. A. Thompson, Clerk. Hatch & Silliman, Solicitors for defendant, Stangenwald Building, Honolulu, T. H.

[197—140]

In the First Judicial Circuit, Territory of Hawaii.

EQUITY No. 1324.

At Chambers.

GEORGE II BROWN and FRANCIS HYDE
BROWN, Minors, by Their Next Friend,
ALBERT F. JUDD,

Plaintiffs,

vs.

CHARLES A. BROWN, JOHN A. MAGOON, and
IRENE II HOLLOWAY,

Defendants.

Demurrer of J. Alfred Magoon.

**BILL TO DECLARE A TRUST AND FOR
RELIEF.**

**DEMURRER OF J. ALFRED MAGOON, ONE
OF THE DEFENDANTS TO THE BILL OF
COMPLAINT OF GEORGE II BROWN AND
FRANCIS HYDE BROWN, MINORS, BY
THEIR NEXT FRIEND, ALBERT F.
JUDD.**

This defendant by protestation, not confessing any or all of the matters and things in the plaintiffs' bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to said bill, and for cause of demurrer shows:

That said bill shows on its face that the plaintiffs are not entitled to the relief therein prayed for or any part thereof, or to any relief in a court of equity.

WHEREFORE and for divers good causes of demurrer appearing in said bill, this defendant demurs thereto and to all matters and things therein contained and prays the judgment of this Honorable Court whether he shall be compelled to make any further or other answer thereto, and prays to be hence dismissed with his costs in this behalf sustained.

**J. ALFRED MAGOON,
HATCH & SILLIMAN,**

Solicitors for Defendant J. Alfred Magoon.

We certify that the foregoing Demurrer is not intended for purposes of delay.

HATCH & SILLIMAN,

Solicitors for J. Alfred Magoon, one of the Defendants.

[Endorsed]: Equity No. 1324. Circuit Court, First Judicial Circuit, Territory of Hawaii. George Ii Brown and Francis Hyde Brown, Minors, by their next friend, Albert F. Judd, Plaintiffs, vs. Charles A. Brown, John A. Magoon, and Irene Ii Holloway, Defendants. Demurrer of Defendant, J. Alfred Magoon. Received and Filed Feb. 9, 1903. J. A. Thompson, Clerk. Hatch & Silliman, Solicitors for Defendant, Stangenwald Building, Honolulu, T. H. [199—142]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

IN EQUITY.

At Chambers.

GEORGE II BROWN and FRANCIS HYDE
BROWN, Minors, by Their Next Friend,
ALBERT F. JUDD,

Plaintiffs,

vs.

CHARLES A. BROWN, JOHN A. MAGOON, and
IRENE II HOLLOWAY,

Defendants.

Decision.

**BILL TO PROMOTE A TRUST AND FOR
RELIEF.**

The plaintiffs in this case are the two minor chil-

dren, defendants Chas. A. Brown and Irene Ii Holloway, formerly Irene Ii Brown. And in their bill of complaint they seek by their next friend, A. F. Judd, to have a trust declared in certain stock of the corporation known as the John Ii Estate, Limited, on the ground that the defendant Irene Ii Holloway executed a deed to said corporation of certain property, which she claimed by virtue of the last will of John Ii.

The bill alleges that the plaintiff Irene, together with the defendant, Charles A. Brown, upon July 2, 1897, executed a deed of conveyance of certain property, described in the will of said John Ii, to a trustee, upon trust to be conveyed to a corporation, which was afterwards formed and known as the John Ii Estate, Limited.

The bill further sets out certain proceedings brought in the Circuit Court to construe the will, and also the submission by one of the Judges of the Circuit Court of the question of the construction of the will to the Supreme Court.

The bill alleges that the decision rendered thereon by one [200—143] Supreme Court Judge and two lawyers was not a decision of the Supreme Court which had either force or effect, on the ground that the court was not constitutionally constituted, and the further ground that the Court had no jurisdiction to hear a reserved question of law in an equity case.

Plaintiffs contend further that this Court should construe the will now, and that upon proper construction thereof said defendant Irene only acquired

a life estate in the property, and that her children, the plaintiffs herein, by virtue of said will, are the absolute owners in fee of the property, subject only to their mother's life estate.

Plaintiffs contend further, that they being entitled, under a proper construction of the will, to an estate in fee in the property, subject only to the said Irene life estate, the conveyance by said Irene of the property, to the John Ii Estate, Limited, conveyed it subject to a trust, and that they are entitled to have a trust declared in the stock issued by said corporation, which represents as capital stock the value of the property so conveyed.

Plaintiffs annex to their bill a copy of the will, and a copy of the conveyance by the said Irene, and the said C. A. Brown, to a trustee of certain property which they allege comprises the property described in the will, and to which they claim title.

Defendant C. A. Brown demurred to the bill, and the defendant Irene Holloway answered. Defendant Magoon also demurred to the bill. Defendant Magoon's demurrer was a general demurrer; and the demurrer of C. A. Brown sets up fourteen different grounds as causes for demurrer.

The theory upon which the complaint is drawn, it seems to me, is that the alleged property of the plaintiffs has been transferred to the John Ii Estate, Limited, and therefore the [201—144] plaintiffs are entitled to have the defendants, who hold the stock, declared trustees for the plaintiffs.

It is true that the plaintiffs alleges that this property was conveyed by a deed of conveyance to the

corporation, and refers to the property as the property described in the will. The complaint, however, sets out a copy of the deed, and describes the property as follows:

"All and singular the land situate in the Hawaiian Islands, belonging to the parties of the first and second part (Irene and C. A. Brown) or either of them, and all their right, title and interest, whether by courtesy, dower or otherwise, in and to the lands of each other situate in the Hawaiian Islands." And also certain contracts and personal property.

Now, if the contentions and allegations of the plaintiffs are true that under the will the plaintiffs became entitled to a fee in the property in question, I cannot see how under this deed said property could pass or be conveyed, for in that case it would not be property belonging to either party. If the said Irene only held a life estate in the land, that estate would undoubtedly pass under the deed conveying all her right, title and interest in any lands in the Hawaiian Islands, but she certainly could not convey by deed property she did not own, and as the deed does not describe the property, I do not see how it could be claimed that a conveyance of the property she owned would cover property she did not own.

It will be seen, therefore, that if all the allegations of the plaintiffs' bills are true, and that as a matter of law the property described in the will of John Ii descended to his children in fee, subject only to a life estate in Irene, the allegation that by this deed she conveyed this property could not be true, for even if she had described the property in the [202—

145] deed, it would not convey title if she did not own it, and certainly the Court cannot say that a deed conveying property, described—not be metes and bounds, or any other way than all the property belonging to the vendor, can include property she did not own.

The allegation that she conveyed this property by a deed annexed to the complaint, is a mere allegation of the legal effect of the deed, and cannot control in any way the deed itself; and therefore it must be held that, even conceding that the legal effect of the will is correct, still the plaintiffs do not show by their bill that their property has been conveyed to the corporation.

It must be admitted that the claim of plaintiffs as to the legal effect of the will that the children took a fee, and the mother only a life estate in the property, is not without force, but owing to the conclusion I have reached it is unnecessary to go into this question, and in their questions argued: such as the effect of the Supreme Court decision and the legality of the Court, upon the grounds above set out. I think the bill fails to show equity on its face; I therefore sustain the demurrer.

GEAR, J.

Feb. 20th, 1903.

[Endorsed:] Circuit Court, 1st Judicial Circuit, At Chambers. In Equity. Geo. Ii Brown et al. By A. F. Judd, Plaintiffs, vs. Chas. A. Brown et als., Defendants. Decision. Filed Feb. 20th, '03. F. H. Loucks, Clerk. [203—146]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

IN EQUITY.

At Chambers.

GEORGE II BROWN and FRANCIS HYDE
BROWN, Minors, by Their Next Friend,
ALBERT F. JUDD,

Plaintiffs,

vs.

CHARLES A. BROWN, JOHN A. MAGOON, and
IRENE II HOLLOWAY,

Defendants.

Decree.

BILL TO PROMOTE A TRUST AND FOR
RELIEF.

The demurrer of defendants, Charles A. Brown and J. Alfred Magoon, in the above-entitled cause, having come on to be heard before me, A. S. Hartwell, Esq., appearing for plaintiffs, and R. D. Silliman, Esq., of the firm of Hatch & Silliman, and J. Alfred Magoon, Esq., appearing for defendants, Charles A. Brown and J. Alfred Magoon, after hearing argument of respective counsel, the Court, on the 20th day of February, 1903, rendered its decision sustaining said demurrer.

NOW, THEREFORE, IT IS ORDERED, AD-
JUDGED AND DECREED, that plain-
G. D. G. tiffs take nothing by their said bill, and
the same is hereby dismissed (with leave

for plaintiffs to move to amend if they be so advised).

Dated Honolulu, February 25th, 1903.

(Signed) GEO. D. GEAR,

Third Judge of the Circuit Court, First Circuit.

[Endorsed:] In the First Circuit Court, Territory of Hawaii. At Chambers. In Equity. George Ii Brown et al., Plaintiffs, vs. Chas. A. Brown et al., Defendants. Decree. Received, ——— Filed Feb. 25, 1903. J. A. Thompson, Clerk. [204—147]

In the First Judicial Circuit, Territory of Hawaii.

No. E. 1324.

At Chambers.

GEORGE II BROWN and FRANCIS HYDE
BROWN, by Their Next Friend, ALBERT
F. JUDD,

Plaintiffs,

vs.

CHARLES A. BROWN, JOHN A. MAGOON, and
IRENE II HOLLOWAY,

Defendants.

Plaintiffs' Motion to Amend Bill.

**BILL TO DECLARE A TRUST AND FOR
RELIEF.**

The plaintiffs move for leave to amend their bill as follows, viz.: By inserting therein, as paragraph "7" the following paragraph, to wit:

"7." And the plaintiffs aver that the said conveyances to said trustees and by said trustees to said corporation, were intended and declared by the re-

spective grantors, as well as grantees thereof, to convey to said grantees respectively the fee simple of the lands named in said will as devised to the children of the defendant Irene, and that ownership in fee simple of said lands is claimed and exercised by the said corporation under and by virtue of said conveyances; that the said shares of the capital stock of said corporation were issued on the claim by said corporation of such ownership in fee and represent the value thereof, and also that it is claimed by the defendants that the said proceedings and decision of said Supreme Court are conclusive upon the plaintiffs and forever bar them from setting up any title under said will in the aforesaid lands.

And the plaintiffs further say that in consequence of said [205—148] decision of said Supreme Court they have been deprived of trustees as provided under said will, whose duty it would be to preserve the plaintiffs' rights as remaindermen in said land and to see to it that no waste was committed upon the same or other injury done thereto to the plaintiffs' detriment as such remaindermen, and otherwise to protect the plaintiffs' interest in the premises.

And the plaintiffs further say that unless the invalidity of said proceedings and decision of court and also the plaintiffs' titles herein claimed, shall be declared by the court, a cloud will rest upon the plaintiffs' title and their rights in said land as such remaindermen may be made subject to costly and difficult litigation.

And plaintiffs further move for leave to amend

their prayer in said Bill by inserting after the word "require" in the fourth paragraph thereof, the following:

"And specifically that a declaratory decree be made declaring that the proceedings, decision and conveyances herein mentioned are invalid and of no effect as against the plaintiffs."

Dated Feby. 24, 1903.

GEORGE II BROWN,
FRANCIS HYDE BROWN.

By Their Next Friend,
ALBERT F. JUDD.

ALFRED S. HARTWELL,
Of Counsel.

Territory of Hawaii,
Honolulu, Island of Oahu.

Personally appeared the above-named Albert F. Judd, who on oath deposes and says, that the matters and things hereinabove stated are true.

ALBERT F. JUDD.

Subscribed and sworn to before me this 24th day of February, 1903.

[Seal]

J. S. WALKER.

Notary Public. [206—149]

NOTICE OF MOTION.

To Messrs. Hatch & Silliman, J. A. Magoon and
Robertson & Wilder, Defendants' Attorneys:

TAKE NOTICE that the above MOTION will be presented to the Honorable George D. Gear, at Chambers, at ten o'clock A. M. on Friday, the 27th

202 *The John Ii Estate, Limited, et al.*

inst., or as soon thereafter as counsel may be heard.

Dated Feby. 24, 1903.

ALBERT F. JUDD,

Next Friend of the Minor Plaintiffs, by His
Attorney.

ALFRED S. HARTWELL.

[Endorsed]: No. 1324. In the First Judicial Circuit, Territory of Hawaii. George Ii Brown and Francis Hyde Brown, by Their Next Friend, Albert F. Judd, vs. Charles A. Brown, John A. Magoon and Irene Ii Holloway. Plaintiffs' Motion to Amend Bill & Notice. Filed Feby. 24, 1903. Geo. Lucas, Clerk. Alfred S. Hartwell, Plaintiffs' Attorney. Stangenwald Bldg., Honolulu.

Feb. 27, '03. Motion granted and the defendants given 10 days in which to demurer—so ordered by the Court. Loucks. [207—150]

In the First Judicial Circuit, Territory of Hawaii.

No. E. 1324.

At Chambers.

GEORGE II BROWN and FRANCIS HYDE
BROWN, by Their Next Friend, ALBERT
F. JUDD,

Plaintiffs,

vs.

CHARLES A. BROWN, JOHN A. MAGOON and
IRENE II HOLLOWAY,

Defendants.

**Affidavit in Support of Plaintiffs' Motion to Amend
Bill.**

**BILL TO DECLARE A TRUST AND FOR
RELIEF.**

Territory of Hawaii,

Honolulu,

Island of Oahu,—ss.

Personally appeared Alfred S. Hartwell, who on oath deposes and says: That as attorney and counsel for the plaintiffs he prepared and drafted their Bill of Complaint herein, and that until the opinion herein filed by His Honor, George D. Gear, it had not occurred to this deponent that the said Bill of Complaint would be taken as otherwise showing that the conveyances therein referred to were intended and declared by the respective grantors as well as grantees thereof, to convey to the said grantees respectively the fee simple of the lands named in said will as devised to the children (being the plaintiffs) of the defendant Irene, or that the said Bill did not show by clear inference that ownership in fee simple of said lands is claimed and exercised by the said corporation known as the John Ii Estate, Limited, under and by virtue of said [208—151] conveyances, or that the said shares of the capital stock named in the bill were issued otherwise than on the claim of said corporation of such ownership in fee and representing the value thereof, but that since reading the said opinion deponent has felt that it would be for the interests of the plaintiffs to pre-

sent more fully and specifically the matters stated in the proposed amendment of the bill herewith filed with a view of presenting the plaintiffs' case in a form more likely to bring it under the *quia timet* jurisdiction in equity, or as a case for alternative relief; and that this deponent believes that the proposed amendment is material for that purpose.

ALFRED S. HARTWELL.

Subscribed and sworn to before me this 26th day of February, A. D. 1903.

[Seal]

ALFRED T. BROCK,

Notary Public, 1st Judicial Circuit.

[Endorsed]: No. E. 1324. In the First Judicial Circuit, Territory of Hawaii. George Ii Brown et al. vs. Charles A. Brown et al. Affidavit in support of Plaintiffs' Motion to Amend Bill. Filed February 26, 1903. J. A. Thompson, Clerk. Alfred S. Hartwell, Attorney at Law, 611 Stangenwald Building, Honolulu. [209—152]

In the First Judicial Circuit, Territory of Hawaii.

No. E. 1324.

GEORGE II BROWN and FRANCIS HYDE
BROWN, by Their Next Friend, ALBERT
F. JUDD,

Plaintiffs,

vs.

CHARLES A. BROWN, JOHN A. MAGOON and
IRENE II HOLLOWAY,

Defendants.

Order Allowing Amendment of Bill.

**BILL TO DECLARE A TRUST AND FOR
RELIEF.**

Upon the plaintiffs' motion herein filed for leave to amend their Bill, as in said motion set forth, counsel for plaintiffs this day appearing in support of the said motion, and defendant's counsel also appearing and showing no sufficient legal cause why the same should not be granted, it is hereby ordered that the plaintiffs be and are hereby allowed to amend their bill, as in said motion set forth, and that upon filing the same said bill shall be deemed to be amended accordingly, and the defendants are hereby granted ten days within which to plead, *demurrer* or answer thereto, as advised.

Dated Feby. 27, 1903.

GEO. D. GEAR,

Judge.

[Endorsed]: No. E. 1324. In the First Judicial Circuit, Territory of Hawaii. George Ii Brown et al. vs. Chas. A. Brown et al. Order Allowing Amendment. Filed Feb. 27th, 1903. F. H. Loucks, Clerk.
[210—153]

In the First Judicial Circuit, Territory of Hawaii.

No. E. 1324.

At Chambers.

GEORGE II BROWN and FRANCIS HYDE
BROWN, by Their Next Friend, ALBERT
F. JUDD,

Plaintiffs,

vs.

CHARLES A. BROWN, JOHN A. MAGOON and
IRENE II HOLLOWAY,

Defendants.

Amendment of Plaintiffs' Bill.

**BILL TO DECLARE A TRUST AND FOR
RELIEF.**

The plaintiffs, pursuant to order of court herein filed granting them leave to amend their Bill, as set forth in their Motion herein filed, do now amend their Bill by inserting therein, immediately after the sixth paragraph—sixth paragraph being the last paragraph in said Bill—the following, as paragraph seven:

“7. And the plaintiffs aver that the said conveyances to said trustees and by said trustees to said corporation, were intended and declared by the respective grantors, as well as grantees thereof, to convey to said grantees respectively the fee simple of said lands named in said will as devised to the children of the defendant Irene, and that ownership in fee simple of said lands is claimed and exercised by

the said corporation under and by virtue of said conveyances; that the said shares of the capital stock of said corporation were issued on the claim by said corporation of such ownership in fee and represent the value thereof, and also that it is claimed by the defendants that the said proceedings and decision of said [211—154] Supreme Court are conclusive upon the plaintiffs and forever bar them from setting up any title under said will in the aforesaid lands.

And the plaintiffs further say that in consequence of said decision of said Supreme Court they have been deprived of trustees as provided under said will, whose duty it would be to preserve the plaintiffs' rights as remaindermen in said land and to see to it that no waste was committed upon the same or other injury done thereto to the plaintiffs' detriment as such remaindermen, and otherwise to protect the plaintiffs' interests in the premises.

And the plaintiffs further say that unless the invalidity of said proceedings and decision of court and also the plaintiffs' titles herein claimed, shall be declared by the court, a cloud will rest upon the plaintiffs' title and their rights in said land as such remaindermen may be made subject to costly and different litigation."

And the plaintiffs, pursuant to said order granting leave to amend, do hereby amend their prayer in said bill by inserting after the word "require" in the fourth paragraph thereof, the following:

"And specifically that a declaratory decree be made declaring that the proceedings, decision and

conveyances herein mentioned are invalid and of no effect as against the plaintiffs," so that the prayer of said bill, when so amended, will read as follows, viz.:

"WHEREFORE, plaintiffs pray as follows:

1. That process do issue summoning the defendants to appear and answer hereunto and that they be bound by the proceedings to be had herein;

2. That your Honor do order and decree that the said defendants assign the said one thousand shares (held by them as [212—155] aforesaid) to a trustee, in trust as to 500 shares, to pay the income thereof to said Irene, and as to another 500 shares, to pay the income thereof to the defendant Charles A. Brown, during the life of the said Irene, and at her death, to assign all of the said shares to the plaintiffs absolutely;

3. That the defendants Brown and Magoon, and each of them, be enjoined and directed by a restraining order directing them not to sell, pledge or otherwise dispose of the said 500 shares held by them as aforesaid, until further order, and that such restraining order be issued with said process; and,

4. For such other, further and appropriate relief, orders and decrees as the nature of the case may require, and specifically that a declaratory decree be made declaring that the proceedings, decision and conveyances herein mentioned are in-

valid and of no effect as against the plaintiffs.

And the plaintiffs will ever pray, etc.”

Dated Feby. 27, 1903.

ALBERT F. JUDD,

Next Friend of George Ii Brown and Francis Hyde
Brown, Minors,

By ALFRED S. HARTWELL,

Plaintiffs' Counsel and Attorney.

[Endorsed]: No. E. 1324. In the First Judicial
Circuit, Territory of Hawaii. George Ii Brown and
Francis Hyde Brown, by Their Next Friend Albert
F. Judd, vs. Charles A. Brown, J. A. Magoon and
Irene Ii Holloway. Amendment of Plaintiffs' Bill.
Filed February 27, 1903. J. A. Thompson, Clerk.
Alfred S. Hartwell, Attorney at Law, 611 Stangen-
wald Building, Honolulu. [213—156]

In the First Judicial Circuit, Territory of Hawaii.

EQUITY NO. 1324.

At Chambers.

GEORGE II BROWN, and FRANCIS HYDE
BROWN, Minors, by Their Next Friend,
ALBERT F. JUDD,

Plaintiffs,

vs.

CHARLES A. BROWN, JOHN A. MAGOON and
IRENE II HOLLOWAY,

Defendants.

**Demurrer of Charles A. Brown to Amended Bill.
BILL TO DECLARE A TRUST AND FOR
RELIEF.**

THE DEMURRER OF CHARLES A. BROWN,
ONE OF THE ABOVE-NAMED DEFEND-
ANTS, TO THE AMENDED BILL OF COM-
PLAINT OF GEORGE II BROWN AND
FRANCIS HYDE BROWN, MINORS, BY
THEIR NEXT FRIEND ALBERT F. JUDD.

This defendant, by protestation, not confessing any of the matters and things in the plaintiffs' amended bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to said amended bill of complaint, and for cause of demurrer shows:

1. That it appears that the bill is multifarious in this that it joins the defendant Irene Ii Holloway together with this defendant and the defendant John A. Magoon as parties to the cause when it appears that each of said defendants claims exclusive title to distinct and separate shares of stock in said corporation.

2. That it appears by the allegations of said bill that one thousand of the fifteen hundred shares of the capital stock of the corporation known as "The John Ii Estate, Limited" are held by and in the name of one Alfred W. Carter; that is to say, five hundred shares for said plaintiffs, as trustee and five hundred shares to the use and subject to the order of the [214—157] defendant Irene Ii Holloway, and yet said Alfred W. Carter is not made a

party to this cause, in which respect defendant submits that there is a fatal defect of parties to this cause.

3. That it appears from the bill, as matter of law, that the plaintiffs have no right, title or interest present or expectant in or to any of the shares of stock of this defendant, the transfer of which is sought to be enjoined by them.

4. That it appears upon the face of said bill that the plaintiffs, if they have any interest or estate in the land referred to by them in said bill (assuming that there is any property referred to with certainty in said bill), may, when the time arrives therefor, assert the same in action at law.

5. That it appears on the face of the said bill of complaint that the matters set forth in the first and second paragraphs of said bill have been heretofore adjudicated between the said parties and a judgment made and entered adversely to the contention of said plaintiffs.

6. That it appears on the face of said bill of complaint that the plaintiffs have no right, title, interest or estate in and to any of the property described or referred to in said bill.

7. That it does not appear by the said bill in what particular land or property, if any, the plaintiffs claim to have an interest as remaindermen.

8. That it appears that the plaintiffs do not claim to have any interest or estate in the property, if any, referred to by them in their said bill of which they have a right of present enjoyment.

9. That it does not appear by said bill that the

estate claimed for the plaintiffs in the property, if any, referred to in said bill, is in any way jeopardised or endangered by any of the matters or things stated in said bill.

10. That it is alleged in said bill that said Irene Ii [215—158] Holloway, one of the defendants, had a freehold estate in all of the property conveyed by her to the John Ii Estate, Limited, a corporation; and it appears that this defendant was the owner of certain other property and interests conveyed to said corporation; and it does not appear that any of the property or estate of the plaintiffs was conveyed to said corporation either by them or by any person purporting to act in their behalf and therefore it appears that plaintiffs have no claim upon or interest in the shares of stock of said corporation belonging to this defendant.

11. That it appears in and by said bill that this defendant is the sole lawful owner of four hundred ninety-nine shares of the stock referred to in said bill without any estate in remainder or other right, title or interest whatever in said plaintiffs.

12. That it appears that the plaintiffs' said bill of complaint, in case the same were true, which this defendant does in nowise admit, contains no matter or equity whereon this court can ground a decree or give the complainants any relief or assistance as against this defendant.

WHEREFORE this defendant demurs to said bill and to all matters and things therein contained and prays the judgment of this Honorable Court whether he shall be compelled to make any further or other

answer thereto; and prays to be hence dismissed with his costs in his behalf expended.

HATCH & SILLIMAN,
J. ALFRED MAGOON,

Solicitors for Defendant Charles A. Brown.

We certify that the foregoing Demurrer is not intended for purposes of delay.

HATCH & SILLIMAN,
J. ALFRED MAGOON,

Solicitors for Defendant Charles A. Brown.

[Endorsed]: E. 1324. First Circuit Court, First Judicial Circuit, Territory of Hawaii. George Ii Brown, et al., Plaintiffs; vs. Charles A. Brown, et al. Defendants. Demurrer of Defendant Charles A. Brown. Received \$———. Filed Feb. 28, 1903, J. A. Thompson, Clerk. Hatch & Silliman, Solicitors for Defendant. Stangenwald Building, Honolulu, T. H. [216—159]

In the First Judicial Circuit, Territory of Hawaii.

EQUITY NO. 1324.

At Chambers.

GEORGE II BROWN, and FRANCIS HYDE
BROWN, Minors, by Their Next Friend,
ALBERT F. JUDD,

Plaintiffs,

vs.

CHARLES A. BROWN, JOHN A. MAGOON and
IRENE II HOLLOWAY,

Defendants.

**Demurrer of J. Alfred Magoon to Amended Bill.
BILL TO DECLARE A TRUST AND FOR
RELIEF.**

DEMURRER OF J. ALFRED MAGOON, ONE OF
THE ABOVE-NAMED DEFENDANTS, TO
THE AMENDED BILL OF COMPLAINT OF
GEORGE II BROWN AND FRANCIS HYDE
BROWN, MINORS, BY THEIR NEXT
FRIEND, ALFRED F. JUDD.

This defendant by protestation, not confessing any or all of the matters and things in the plaintiffs' amended bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to said bill, and for cause of demurrer shows;

That said amended bill shows on its face that the plaintiffs are not entitled to the relief therein prayed or any part thereof or to any relief in a court of equity.

WHEREFORE for divers good causes of demurrer appearing in said bill, this defendant demurs thereto and to all matters and things therein contained and prays the judgment of this Honorable Court whether he shall be compelled to make any further or other answer thereto, and prays to be hence dismissed with his costs in this behalf expended.

J. ALFRED MAGOON,
HATCH & SILLIMAN,
Solicitors for Defendant J. Alfred Magoon.

We certify that the foregoing [217—160] demurrer is not intended for purposes of delay.

J. ALFRED MAGOON,
HATCH & SILLIMAN,

Solicitors for Defendant J. Alfred Magoon.

[Endorsed]: E. 1324. Circuit Court, First Judicial Circuit, Territory of Hawaii. George Ii Brown, et al., Plaintiffs, vs. Charles A. Brown, et al., Defendants. Demurrer of Defendant J. Alfred Magoon. Received \$———. Filed Feb. 28, 1903, J. A. Thompson, Clerk. Hatch & Silliman, Solicitors for Defendant. Stangenwald Building, Honolulu, T. H. [218—161]

In the Circuit Court of the First Circuit, Territory of Hawaii.

E. #1324.

At Chambers.

GEORGE II BROWN and FRANCIS HYDE
BROWN, Minors, by the Next Friend
ALBERT F. JUDD,

vs.

CHARLES A. BROWN, JOHN A. MAGOON and
IRENE II HOLLOWAY.

**Answer of Irene Ii Holloway to Plaintiffs' Amended
Bill of Complaint.**

BILL TO DECLARE A TRUST, ETC.

Now comes Irene Ii Holloway, one of the defendants in the above-entitled cause, and for answer to the Amended Bill of Complaint of the said George Ii Brown and Francis Hyde Brown, alleges as follows:

1.

That she admits the allegations contained in paragraphs 1, 3, 4, 6 and 7 of said amended bill of complaint.

2.

That she admits the allegations contained in paragraph 2 of said amended bill of complaint except the allegation that the said John Ii meant and intended by his said last will that this defendant should have the use and benefit of said property during her lifetime only. And she alleges that she was given in and by said will the said property in fee simple.

3.

That she admits the allegations contained in paragraph 5 of said bill of complaint except the allegation that the articles of association therein referred to should or do provide that the sole control and management of the property conveyed to said [219—162] corporation should be given to and kept by said Charles A. Brown.

4.

That she denies all allegations in said amended bill of complaint contained which are not herein admitted.

Wherefore this defendant prays that she may be hence dismissed and that she have her costs in this behalf sustained.

IRENE II HOLLOWAY.

Dated, Kawaihae, March 4, 1903.

ROBERTSON & WILDER,

Attorneys for Irene Ii Holloway.

Territory of Hawaii,
Island of Hawaii,—ss.

Irene Ii Holloway, being duly sworn, says that the allegations contained in the foregoing answer are true.

IRENE II HOLLOWAY.

Subscribed and sworn to before me this 4th day of March, A. D. 1903.

[Seal]

SAMUEL K. PUA,

Notary Public, 3rd Judicial Circuit, T. H.

[Endorsed]: E. 1324. Circuit Court, First Circuit. In Equity. George Ii Brown et al. vs. Charles A. Brown et al. Answer of Irene Ii Holloway to Plaintiffs' Amended Bill of Complaint. Received \$——. Filed Mar. 16, 1903. J. A. Thompson, Clerk. Robertson & Wilder, Attys. for Irene Ii Holloway, Honolulu. [220—163]

In the Circuit Court of the First Circuit, Territory of Hawaii.

IN EQUITY.

At Chambers.

GEORGE II BROWN et al.

vs.

CHARLES A. BROWN et al.

Decision on Demurrer to Amended Bill.

Plaintiffs herein, by leave of Court filed their amended bill, setting out, by way of amendment, that the deed attached to the original bill which purported to convey all the property of Irene Ii Holloway and

C. A. Brown, situated in the Hawaiian Islands, and "owned" by them was "intended and declared" by them as well as by the grantees to convey to said grantees the fee simple of the lands named in the will of John Ii as devised to the children of said Irene, and that "ownership in fee simple of said lands is claimed and exercised by the said corporation under and by virtue of said conveyances; that the *sahres* of stock represent the value of the land and that defendants claim that the decision of the Supreme Court construing the will bars the children from setting up title to said land under the will.

Plaintiffs' claim that this casts a cloud upon their title which should be removed.

The allegations in the amendment do not take the case out of the rules set out in the former decision rendered in this case upon demurrer to the original bill, unless the bill is now good as a bill *quia timet*.

It has been held that the equity action of *quia timet* still lies, and that the jurisdiction of this action in equity has not been taken away by the statutory action to quiet title. [221—164]

"The statutory remedy is merely permissive and does not exclude or abrogate the remedy, if any, previously existing in equity."

Ahmi vs. Ashford, 12 Haw. 12, 13;

Kahoiwai vs. Limaueu, 10 Haw. 509.

But plaintiffs are not in possession of the land in question; at least it is not so alleged in the bill, and the allegation of the amendment as to the possibility of waste being committed would lead the Court to infer that plaintiffs are out of, and the defendants or

their grantees, in possession of the land.

"The demurrer should have been sustained, as it was, because the bill did not show that plaintiff was in possession."

Ahmi vs. Ashford, 2 Haw. 13.

If the allegations of the amended bill are true, as they must be taken to be on demurrer, the demurrer must be sustained as the plaintiffs have their remedy by an action to quiet title. In such an action the question is immaterial as to whether the plaintiffs are in or out of possession.

So far as the bill is treated as a bill to declare a trust the allegations as to what the grantors "intended and declared" to convey by the deed, do not help plaintiffs' case for no "intention" or "declaration" can vary the legal effect of the deed, and if it did not have the legal effect to convey a fee simple title to the land on its face, their intention and declaration could not make it do so.

For these reasons and those contained in the former decision on demurrer, this demurrer must be sustained and the bill ordered dismissed and it is so ordered.

GEAR, J.

[Endorsed]: No. —. In the Circuit Court of First Circuit, Territory [222—165] of Hawaii. E. 1324. Geo. Ii Brown et al., Plaintiffs, vs. Chas. A. Brown et al., Defendants. Decision on Demurrer to Amended Bill. Filed March 11, '03. F. H. Loucks, Clerk. [223—166]

In the First Circuit, Territory of Hawaii.

No. 1324.

At Chambers.

GEORGE H BROWN and FRANCIS HYDE
BROWN, by Their Next Friend ALBERT
F. JUDD,

Plaintiffs,

vs.

CHARLES A. BROWN, JOHN A. MAGOON, and
IRENE HOLLOWAY,

Defendants.

Decree, Filed March 12, 1903.

**BILL TO DECLARE A TRUST AND FOR
RELIEF.**

The above cause having come regularly on to be heard upon the demurrers of the defendants Charles A. Brown and J. Alfred Magoon to the bill of complaint as amended on the 4th day of March, A. D. 1903, at ten o'clock of the forenoon of said day, Alfred S. Hartwell, Esq., appearing for plaintiffs, and Messrs. Hatch & Silliman, J. Alfred Magoon and Thomas I. Dillon appearing for the defendants Charles A. Brown and J. Alfred Magoon, and the Court having duly considered said matter and rendered a decision in writing herein sustaining the demurrers of said defendants Charles A. Brown and J. Alfred Magoon to the said amended bill of complaint;

IT IS ORDERED, ADJUDGED AND DECREED that the said bill be and the same is hereby

dismissed and the said defendants be and they are hereby awarded their costs to be taxed by the Clerk.

Dated this 12th day of March, A. D. 1903.

GEO. D. GEAR,

Judge.

A. S. H.

H. & S.

[Endorsed]: No. 1324. Circuit Court, First Judicial Circuit, Territory of Hawaii. George Ii Brown et al., Plaintiffs, vs. Charles A. Brown et al., Defendants. Decree. Filed March 12, 1903. George Lucas, Clerk. Hatch & Silliman, J. Alfred Magoon and T. I. Dillon, Solicitors for Defendants, Honolulu, T. H. [224—167]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

GEORGE II BROWN and FRANCIS HYDE
BROWN, Minors, by Their Next Friend
ALBERT F. JUDD,

Plaintiffs,

vs.

CHARLES A. BROWN, JOHN A. MAGOON and
IRENE II HOLLOWAY,

Defendants.

**Certificate of Clerk, Circuit Court, to Record in
George Ii Brown et al. vs. Charles A. Brown et al.**

**BILL TO DECLARE A TRUST AND FOR
RELIEF.**

Territory of Hawaii,

City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Circuit Court

of the First Judicial Circuit, Territory of Hawaii, do hereby certify that the foregoing documents and attached hereto together with the endorsements thereon and enumerated hereunder, to wit:

1. Bill of Complain*ing* and annexed thereto as parts thereof, are Copy of the Will of John Ii in the Hawaiian language and a translation thereof by W. L. Wilcox, also copy of indenture dated July 2, 1897, between Irene Ii Brown, of the first part, C. A. Brown, party of the second part and Henry Holmes, party of the third part;
2. Chambers Summons, annexed thereto is copy of the service of summons and of the complaint;
3. Answer of Irene Ii Holloway;
4. Demurrer of Charles A. Brown;
5. Demurrer of J. Alfred Magoon;
6. Decision of Hon. George D. Gear, dated Feb. 20, 1903;
7. Decree dated Feb. 25, 1903;
8. Plaintiffs' Motion to amend bill and Notice of motion;
9. Affidavit of Alfred S. Hartwell in support of plaintiffs' motion to amend bill;
10. Order allowing amendment;
11. Amendment of plaintiffs' bill;
12. Demurrer of Charles A. Brown to the amended bill of complaint; [225—168]
13. Demurrer of J. Alfred Magoon to the amended bill of complaint;
14. Answer of Irene Ii Holloway to the amended bill of complaint;

15. Decision of Hon. George D. Gear, to amended bill, dated March 11, 1903; and
16. Decree dated March 12, 1903,
—are full, true and correct copies of the originals thereof which are now on file in the Clerk's Office of said Circuit Court in the foregoing entitled cause. (Equity Division Number 1324.)

Witness my hand and the Seal of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Honolulu, Oahu, this 12th day of November, A. D. 1909.

[Seal] (Signed) JAMES A. THOMPSON,
Clerk Circuit Court of the First Judicial Circuit,
Territory of Hawaii.

[Endorsed]: E. No. 1324. Circuit Court, First Circuit, Territory of Hawaii. George Ii Brown and Francis Hyde Brown, Minors, by Their Next Friend, Albert F. Judd vs. Charles A. Brown, John A. Magoon, and Irene Ii Holloway. Certified Transcript of Record.

[Endorsed]: No. 47. U. S. Dist. Court, Territory of Hawaii, United States of America vs. John Ii Estate, Ltd., an Hawaiian Corporation, et al. Exhibit 3, for Geo. Ii Brown and Francis Hyde Ii Brown, Respondents. Filed Dec. 2, 1909. A. E. Murphy, Clerk, by A. A. Deas, Deputy Clerk.
[226—169]

**Exhibit No. 4—Transcript of Record in Cause
Entitled George Ii Brown et al. vs. Charles A.
Brown et al., in the Supreme Court of the Ter-
ritory of Hawaii.**

In the Supreme Court of the Territory of Hawaii.

GEORGE II BROWN and FRANCIS HYDE
BROWN, Minors, by Their Next Friend,
ALBERT F. JUDD,

vs.

CHARLES A. BROWN, JOHN A. MAGOON and
IRENE HOLLOWAY.

TRANSCRIPT OF RECORD. [227—170]

In the First Judicial Circuit, Territory of Hawaii.

No. E. 1324.

At Chambers.

GEORGE II BROWN and FRANCIS HYDE
BROWN, by Their Next Friend, ALBERT
F. JUDD,

Plaintiffs,

vs.

CHARLES A. BROWN, JOHN A. MAGOON and
IRENE II HOLLOWAY,

Defendants.

**Plaintiffs' Appeal (to Supreme Court in George Ii
Brown et al. vs. Charles A. Brown et al.).**

**BILL TO DECLARE A TRUST AND FOR
RELIEF.**

The plaintiffs hereby appeal and give notice of
their appeal to the Supreme Court from the decree

herein made and filed March 12, 1903, by Hon. George D. Gear, sustaining defendants C. A. Brown's and J. A. Magoon's demurrer and dismissing plaintiffs' bill.

Dated March 12, 1903.

GEORGE II BROWN,
FRANCIS HYDE BROWN,

By Their Next Friend,
ALBERT F. JUDD.

ALFRED S. HARTWELL,
Of Counsel.

[Endorsed]: E. 1324. In the First Judicial Circuit, Territory of Hawaii. George Ii Brown et al. vs. Charles A. Brown et al. Plaintiffs' Appeal. Received \$50.00. Filed March 12, 1903. J. A. Thompson, Clerk. Alfred S. Hartwell, Attorney at Law, 611 Stangenwald Building, Honolulu. [229—172]

In the Supreme Court of the Territory of Hawaii.

October Term, 1903.

GEORGE II BROWN and FRANCIS HYDE BROWN, Minors, by Their Next Friend ALBERT F. JUDD, vs. CHARLES A. BROWN, JOHN A. MAGOON and IRENE II HOLLOWAY.

**Opinion of Supreme Court in George Ii Brown et al.
vs. Charles A. Brown et al.**

APPEAL FROM CIRCUIT JUDGE FIRST
CIRCUIT.

Submitted April 24, 1903. Decided November
21, 1903.

FREAR, C. J., GALBRAITH and PERRY, JJ.

A devisee and her husband formed a corporation and conveyed all their lands to it through a trustee and stock was issued to her, her husband and her children respectively. Held, that, assuming that she took only a life interest and that her children took remainders in fee by the devise, the latter were not entitled to have the conveyances set aside or to have the stock that was issued to the husband and wife transferred to a trustee to pay the income to the husband and wife for her life and at her death to assign it to the plaintiffs, even though the husband and wife claimed to have conveyed the fee, inasmuch as, for one reason, the husband and wife purported to convey only their interests, whatever they were.

The Supreme Court had previously decided that the first devisee took the fee under the will, but the children asked to have that decision declared void as to them on the grounds, (1) that the court was composed in part of two substitute members, although as contended, the Constitution allowed only one substitute, (2) that it rendered the decision on questions reserved by a Circuit Judge at chambers, although the statute allowed [230—173] questions to be reserved only by a Circuit Judge in court, (3) that it could not as a court of equity go on and construe the will as to the quantity of estate devised after construing it to the effect that a trust created by it had terminated, and (4) that the rights of the plaintiffs who were infants could

not be waived by their next friend. Held, that the decision was not absolutely void and could not be collaterally attacked even by the infants, and so could not be declared void as to them, even if equity could declare void or even enjoin the enforcement of a decision that was absolutely void on its face.

OPINION OF THE COURT

by
FREAR, C. J.

This was originally a bill to declare a trust and for other incidental relief. It was alleged in substance that the defendants C. A. Brown and Irene I. Holloway, who were formerly husband and wife and are the parents of the plaintiffs, conveyed certain lands claimed to have come to the wife under her father's will to a trustee to convey the same to a corporation to be formed; that the corporation was formed and the property conveyed to it; that one-third of its capital stock is held by the said Irene in the name of A. W. Carter, one-third by said Carter as trustee for the plaintiffs and the remaining third by said Brown, except as to one share, which is held for him by defendant Magoon; that certain proceedings were had in court, before said conveyances were made, in which it was decided that the said Irene owned said property in fee (See *Brown vs. Brown*, 11 Haw. 47), but that said decision was void for want of jurisdiction, and that the said Irene had only a life estate; and therefore it was prayed that the said defendants be required to assign the stock

held by them to a trustee in trust to pay the income of 500 shares thereof to said Irene for life and of another 500 shares to [231—174] the said Brown for the life of the said Irene, and at her death to assign all of the said shares to the plaintiffs absolutely. The defendants Brown and Magoon demurred and the defendant Irene answered. The Circuit Judge sustained the demurrers on the ground that it was immaterial whether Irene took only a life estate or not inasmuch as she and her then husband purported, as shown by the copy of the deed which was made a part of the bill, to convey only the lands belonging to them and their right, title and interest by curtesy, dower or otherwise in the lands of each other, etc., and did not attempt to convey any lands belonging to their children, the plaintiffs, even if the latter had the remainder in fee in the lands in question. In this we concur and so need not consider the remaining thirteen grounds of demurrer.

The plaintiffs then amended their bill, upon leave granted, by alleging in substance that the parties to said conveyances claim that they conveyed the fee, that ownership in fee is claimed and exercised by the corporation, that the stock of the corporation was issued on such claims and represents the value of the fee, and that the defendants claim that the said decision is conclusive on the plaintiffs; and also that in consequence of said decision the will, whose duty it would be to preserve the plaintiffs' rights as remaindermen and otherwise protect their interests; and by praying that the said decision and

conveyances be declared of no effect as against the plaintiffs. The defendants again demurred and answered respectively; the demurrers were sustained and a decree entered dismissing the bill. The plaintiffs appealed.

It is obvious, as held by the Circuit Judge, that the amendments to the bill do not alter the result in so far as this may be considered a bill to declare a trust. The mere fact that the defendants claimed that Irene received the fee under the will assuming that she really had not, would not justify a decree that she did receive it or convey it or that the defendants should convey [232—175] it or the stock, which might represent it if she or they had received it, to a trustee.

The further question remains, whether the bill should now be sustained on the theory that it may be considered a bill to remove a cloud. The Circuit Judge held that equity could not give the desired relief because the plaintiffs were out of possession and so had a remedy at law—under the statutory action to quiet title. Ejectment of course would not lie because as remaindermen the plaintiffs would not have a right of immediate possession. *Sylvester vs. Sylvester*, 83 Me. 46; *Turner vs. House*, 199 Ill. 464. And the statutory remedy to quiet title does not prevent the remedy in equity. *Ahmi vs. Ashford*, 12 Haw. 12.

The alleged clouds are the conveyances and the decision—which it is sought to have declared invalid as against the plaintiffs. First, as to the conveyances. Assuming that the grantors had only a

life estate, the conveyances would be valid to pass that and so could not properly be declared invalid as to that. And, as to the plaintiffs' remainders, assuming that they had remainders, the court could not, on the theory of removing a cloud, declare invalid as against remaindermen conveyances that on their face purport to convey the unquestioned interest and only the interest of the life tenants. A mere declaratory decree upon the construction of the conveyances, to the effect that they did not pass the fee is not asked for and could not properly be granted, if it were.

Secondly, as to the decision. Of course, even if that could properly be declared of no effect as against the plaintiffs, it would still be true that no trust could be declared as to the shares of stock and yet it is somewhat doubtful if the plaintiffs can be considered as seeking a declaratory decree as to the decision alone, and, if they are, it is not clear on what theory they can rightfully ask for a decree merely declaring a decision to be of no effect as against them, without asking for an injunction or [233—176] other relief to prevent its enforcement. Equity does not act directly on judgments nor is it a branch of equity jurisdiction to merely construe judgments. Without going into many of the questions of pleading, practice and jurisdiction raised by the defendants in this case, we take it that the plaintiffs cannot obtain the relief desired unless the decision in question is void. No fraud, accident, mistake or surprise is relied on. If the decision were only voidable, equity could not act. Assuming that

equity may relieve against a decision that is wholly void or even one that is void on its face, we must hold that the decision in question is void. It could not be collaterally attacked. The main grounds on which it is contended that the decision is void are: (1) that the Supreme Court which rendered the decision was composed in part of two substitute members in place of two disqualified regular members, but that under the Constitution not more than one substitute could sit; (2) that the decision was rendered upon reserved questions in equity at chambers but that the statute permitted the reservation of questions in court only, and (3) that there was no jurisdiction to construe the will after deciding that there was no longer any trust in existence. (1) It is at least doubtful whether the constitution (Const. 1894, Art. 83, Sec. 1) did not permit the places of two disqualified members of the court to be filled with substitutes at the same time. The statute clearly did in terms at least. C. L., Sec. 1170. That has been the practice acquiesced in for years under the statute. The court was a *de facto* court and the decisions of a *de facto* court are not void and cannot be questioned collaterally. *Hind vs. Wilder's Steamship Co.*, 14 Haw. 217. See also, *Ninomiya vs. Kupoikai*, *ante*. (2) Granting that the Supreme Court did not have jurisdiction of reserved questions in equity (See *Booth vs. Baker*, 10 Haw. 543, and the decision in question, in *Brown vs. Brown*, 11 Haw. 47), still was the defect such as to make the decision absolutely void? The Court had [234—177] equity jurisdiction on appeals and it also had

jurisdiction of reserved questions in law cases. The defect lies in the method of bringing the question up to this court. The questions were reserved by the Circuit Judge at chambers instead of in court. In our *our* opinion it is not such a defect as renders the decision absolutely void. See *Hind vs. Wilder's Steamship Co.*, *supra*, at page 219. (3) We may assume that according to the weight of authority equity should not entertain a bill solely for the purpose of construing a will, although a number of courts hold otherwise, and this court has gone far in that direction (see *Hyde vs. Smith*, 11 Haw. 535); also that if the court in the former case had jurisdiction at first primarily because a trust was involved and only incidentally of the question of construction it should have declined to answer the latter question when it decided that there was no trust. Still the decision would not be wholly void. It may have been erroneous without being void. Those are questions on which courts differ. The practice is as determined by the courts in each jurisdiction. If the decision was erroneous in these respects, it was mainly because there was an adequate remedy at law. But that was a matter that could be waived. See *Kuala vs. Kuapahi*, *ante*, . And this as well as the other alleged defects above-mentioned could be waived on behalf of the plaintiffs, notwithstanding they are minors, at least, so as to preclude a collateral attack by the minors. See *Kingsbury vs. Buckner*, 134 U. S. 650.

The decree appealed from is affirmed and the case remanded to the Circuit Judge.

W. F. FREAR,

C. A. GALBRAITH.

A. PERRY.

A. S. HARTWELL, for Plaintiffs.

HATCH & SILLIMAN, J. A. MAGOON and

T. I. DILLON, for Defendants Brown and Magoon.

ROBERTSON & WILDER, for Defendant Mrs. Holloway.

[Endorsed]: Supreme Court Territory of Hawaii. George Ii Brown, et al. vs. C. A. Brown. Decision. Filed Nov. 21, 1903. George Lucas, Clerk. [235—178]

In the Supreme Court of the Territory of Hawaii.

GEORGE II BROWN, and FRANCIS HYDE BROWN, Minors, by *the* Their Next Friend, ALBERT F. JUDD,

Plaintiffs,

vs.

CHARLES A. BROWN, JOHN A. MAGOON and IRENE II HOLLOWAY,

Defendants.

Certificate of Clerk, Supreme Court, to Record in George Ii Brown et al. vs. Charles A. Brown et al.

Territory of Hawaii,

City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, do hereby certify

that the foregoing documents and attached hereto, together with the endorsements thereon and enumerated hereunder, to wit:

1. Plaintiffs' Appeal to the Supreme Court, and
2. Decision of the Supreme Court rendered November 21, 1903, are full true and correct copies of the originals thereof which are now on file in the Clerk's office of said Supreme Court in the foregoing entitled cause.

Witness my hand and the Seal of said Supreme Court, at Honolulu, Oahu, this 12th day of November, A. D. 1909.

[Seal] (Signed) JAMES A. THOMPSON,

Clerk Supreme Court of the Territory of Hawaii.

[Endorsed]: Supreme Court, Territory of Hawaii. George Ii Brown and Francis Hyde Brown, Minors, by Their Next Friend Albert F. Judd, vs. Charles A. Brown, John A. Magoon and Irene Ii Holloway. Certified Transcript of Record.

[Endorsed]: No. 47. United States District Court, Territory of Hawaii, U. S. A. vs. John Ii Estate, Ltd., an Hawaiian Corporation, et al. Exhibit 4 for George Ii Brown and Francis Hyde Brown, Respondents. Filed December 2, 1909. A. E. Murphy, Clerk. By A. A. Deaz, Deputy Clerk. [236—179]

**Exhibit No. 5—Articles of Incorporation of the
John Ii Estate, Limited.**

**IN THE MATTER OF THE INCORPORATION
OF THE JOHN II ESTATE, LIMITED.**

ARTICLES OF INCORPORATION.

KNOW ALL MEN BY THESE PRESENTS,
That we, IRENE Ii BROWN, CHARLES A.
BROWN, HENRY HOLMES, J. A. MAGOON and
SIDNEY M. BALLOU, all of Honolulu, Island of
Oahu, Hawaiian Islands, desiring to become incor-
porated as a Joint Stock Company, have and by
these presents do associate ourselves together as a
Joint Stock Company and do hereby certify and
make known as follows:

FIRST: That the name of the corporation is the
JOHN II ESTATE, LIMITED.

SECOND: That the principal office of said Com-
pany shall be at Honolulu, Oahu, Hawaiian Islands.

THIRD: That the business of said corporation
shall be as follows:—(1) To acquire all that prop-
erty heretofore belonging to Irene Ii Brown and C.
A. Brown or either of them and by them conveyed
to Henry Holmes, Trustee, by deed dated July 2nd,
1897, being all and singular the lands situate in the
Hawaiian Islands belonging to said Irene Ii Brown
and C. A. Brown or either of them, and all their
rights, title and interest whether by *courtesy* dower
or otherwise in and to the lands of each other situate
in the Hawaiian Islands, together with the partner-
ship agreement dated the 6th day of September 1893
between C. A. Brown and Lincoln McCandless, also

all contracts and agreements whether by lease or otherwise relating to the said lands also all live stock, belonging to the said Irene Ii Brown and C. A. Brown or either of them in the Hawaiian Islands, and also all mortgages and notes secured by mortgage held by the said Irene Ii Brown and C. A. Brown [237—180] or either of them. (2) To manage the said property as a whole. (3) To farm and (or) cultivate any portion of the lands suitable for the purpose. (4) To lease any portion of the lands for any term receiving payment therefor in produce or otherwise. (5) To divide into house lots any portions of said lands and to sell and lease the same. (6) To carry on the business of ranching, butchering, and (or) forestry. (7) To advance money on mortgage of lands, produce or any real or personal property. (8) To improve any of the lands of the said corporation in any manner whatsoever. (9) To carry on any of the aforesaid business either solely or jointly with any persons or other corporations.

FOURTH: That the amount of the capital stock is One Hundred and Fifty Thousand Dollars divided into fifteen hundred shares of the par value of One Hundred Dollars each with the privilege after notice to the Minister of the Interior of subsequent extension of the capital stock to a sum not to exceed five hundred thousand dollars, but no such extension shall be made except upon a vote of the shareholders of the company holding not less than three fourths of all the shares of the Company.

FIFTH: That the officers of said corporation shall

consist of six persons and shall be a president, a 1st Vice President, a second Vice President, a Secretary, a Treasurer and a Manager in one person and an Auditor.

The officers other than the auditor shall be the directors of the Company. The officers of the Company shall be as follows: Henry Holmes, President. J. A. Magoon, 1st Vice President, Irene Ii Brown, 2nd Vice President, C. A. Brown, treasurer and manager, and S. M. Ballou, secretary. The auditor shall be appointed at the first meeting of the shareholders after the incorporation. [238—181]

The officers and directors shall continue to hold office for one year and thereafter until their successors are appointed. The officers of the company other than the auditor shall be appointed by the shareholders representing not less than three fourths of all the shares of the company. The Auditor need not be a shareholder of the company. He shall be appointed by shareholders representing a majority of all shares of the company.

SIXTH: That the said corporation shall have succession and corporate existence for the term of fifty years and become a body corporate under the name and style of John Ii Estate, Limited, and shall have all the powers and be subject to all the liabilities now provided by law for incorporated companies and shall be subject to all general laws hereafter to be enacted in regard to corporations. No stockholder shall be liable for the debts of the corporation beyond the amounts of what may be due upon the share or shares owned by him.

SEVENTH: Said corporation shall have power to sue and be sued by such corporate name in all courts whatsoever; to make and use a common seal and the same to alter at its pleasure; to hold purchase and convey either absolutely or by way of mortgage real or personal estate not exceeding in value at any one time the sum of One Million Dollars; to buy and sell shares of stock in the corporation or in any other corporation whether the shares of said last mentioned corporations are fully paid up or only partially paid up, and also to buy any shares for its own use and not on commission, also to buy, sell, lease, mortgage, exchange and otherwise manage any real and personal estate at any time owned by the corporation or any easement or rights in connection with said real estate; but no real estate belonging to the company shall be mortgaged, conveyed or sold except by a vote of the majority of the directors of the company. To appoint such subordinate and other officers, and agents [239—182] as the business of the corporation may at any time require. To make by-laws not inconsistent with these articles for the management of the property, election and removal of its officers, and the regulation of its affairs and transfer of its stock as the business of the corporation shall from time to time require. Service of process upon any one of the officers of the corporation shall be deemed good service upon the corporation.

The treasurer and manager if and while he shall be a share holder of the company holding not less than one fourth of all the shares of the company shall have the sole and exclusive charge care and control of all

the real and personal property of the company, all moneys that shall be due, owing or payable to the company shall be receivable by him and all moneys that shall be due, owing or payable by the company shall be disbursed by him and he shall perform such other duties as generally attach to the offices of treasurer and manager. Any limitation on the above powers shall be made only by a vote of the share holders of the company holding not less than three fourths of all the shares of the company.

IN WITNESS WHEREOF, the parties above-named have hereunto set their hands and seals this 9th day of July A. D. 1897.

(S) IRENE II BROWN.
“ C. A. BROWN.
“ HENRY HOLMES.
“ SIDNEY M. BALLOU.
“ J. ALFRED MAGOON.

[240—183]

Hawaiian Islands,
Island of Oahu,—ss.

On this 9th day of July, A. D. 1897, personally appeared before me Irene Ii Brown and C. A. Brown her husband, Henry Holmes, Sidney M. Ballou and J. Alfred Magoon, all known to me to be the persons described in and who executed the foregoing instrument, who severally acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein set forth. And the said Irene Ii Brown acknowledged to me on an examination separate and apart from her husband that she had signed the same without fear, compulsion or con-

straint from her husband.

(S) HARRIET E. WILDER, [Seal]
Notary Public. [241—184]

IN THE MATTER OF THE INCORPORATION
OF THE JOHN II ESTATE, LIMITED.

AFFIDAVIT OF PRESIDENT, SECRETARY
AND TREASURER.

Honolulu, Oahu,—ss.

Henry Holmes, President, S. M. Ballou, Secretary, and C. A. Brown, Treasurer of the John Ii Estate, Limited, being duly sworn each for himself on oath depose and says that the capital stock of the John Ii Estate, Limited, is One Hundred and Fifty Thousand Dollars divided into fifteen hundred shares of the par value of One Hundred Dollars each, that all of the shares of the stock of said corporation have been subscribed for and are fully paid up and that the name of each subscriber for said shares and the number of shares subscribed for by him is as follows, to wit:

C. A. Brown.....	499 shares
Henry Holmes trustee for Irene	
Ii Brown	499 shares
Henry Holmes trustee for	
George Ii Brown and Fran-	
cis Hyde Ii Brown.....	499 shares
S. M. Ballou	1 share
Henry Holmes	1 share
J. A. Magoon	1 share

1500 shares

That the object of the incorporation is to take over and conduct an existing agricultural and grazing and land business, to wit, the management of the lands in the Hawaiian Islands belonging to Irene Ii Brown and C. A. Brown her husband, together with all collateral contracts, leases, mortgages and debts incidental thereto and that a full description of the property intended to represent the capital stock of the proposed corporation and a detailed valuation of each item of said property is as follows: [242—185]

	R. P.	L. C. A.	Area.	Value.
Waipio, Ewa, Oahu	5732	8241	20,542	\$60,000
Pawaa " "	5704	8241	4.02	800
" " "	5704	8241	34.39	14,300
Kalawahine "	5699	8241	.931	400
Makana, Koolauloa "	7985	8308	72.17	2,000
" " "	7985	8308	41.	400
Hana, Maui	5738	8660	1,093.50	7,500
Hilo, Hawaii	5738	1108	2.76	1,000
Waimea, Hawaii	5708	8308	71.75	3,500
Haena, Kauai	5269	7949	1.2/37	200
Kaahuala, Ewa, Oahu	817	5604	.940	200
Eo & Fishery "	5732	8241		12,000
Maemae "	Grant	3387	2.84	500
Manoa "	Grant	31	1.24	700
			21,868.541	\$103,500

Lands under mortgage.

Peke	Royal Patent	7087	L. C. A.	1685
Pi		813		8214 W. W.
Poopalupalu		2242		10613
Nahuina		7528		10512
Kupehe		803		8214 P. W.
Hanaloa #3		2242		10613
Kahuaiki 1 & Houses		2242		10613
Ai		827		8241 L. M.
Kamaka		826		8241 H.
Leoiki		3549		8241 C. W.
Nahua & House Lots		824		8241 L. N.

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Kahuailana		821		8241 B. S.
Puhipaka		825		8241 M. M.
Keliikuhoe		823		8241 R. S.
Kini		6662		4195
		Ili of Waipio		
Ope		812		2862
Kaumiumi		6995		8241 F.
Puou-no-k		2861		11200
Noholo		812		8241 U. S.
Kapela-no-k		7977		5608
Kaohai	Grant	125		
Ulemoku Ap. 2	Grant	128		
Kumumu-no-k	Royal Patent	2864	L. C. A.	5811
Kanupoo	Grant	124		
Hana	Royal Patent	806	"	8241 D. O.
Puhi		5298		1682
Kahakuohia 7/9	Grant	127		
Kaubiohewa	Royal Patent	819	L. C. A.	8241 S. S.
Kaholohana		807		8241 L. K.
W. Harbottle		7391		2937
Kapela	Grant	131 B.		
Kekualilili	Royal Patent	4148	L. C. A.	1614
Kalou		6412		5846
Ulu ¼	Grant	199		
Kailianu	Royal Patent	6465		11193
Kaili		7073		8241 D. D.
Mahoe		848		1675
Hopu		862		1712 B.
Hanaloa #3		2242		10613
Hanapauli		7391		2937
Aniole		4502		10184
Ulemoku	Grant	128		
[243—186]				
Hanaloa # 3	Royal Patent	2242		10613
Hanapauli		7391		2937
Aniole or Miki		4502		10184
Waikakalaua 4/5	Grant	6		
Meahale	Royal Patent	6746		841 R.
Kauhi		6809		8241 G. G.
Kaioe	Royal Patent	6606	L. C. A.	8241 S.
Kauloaiwi		816		8241 V.

Poupou ½		6958	8241 C. C.
Mokunui		7976	8241 L.
Hepa		7978	8241 Y.
Ukeke		5461	8241 N.
Halelaau		7479	8241 X.
Mokuumeume	Grant 1634 R. P.	7960	11216
"	" " "	7960	11216
Poikeo & House	"	6990	8241 P. P.
Kamakea		2110	9002
Keoheaeae		2109	6486
Kahula	Grant	2609	

			Value.
			\$62,562
One half interest cattle and all horses			3,938
3500 acres sugar land at \$30			105,000
	Mortgages.	Forward	103,500
Kalaniku	\$36.40		
Mrs. S. Niau	10.		
Kaaumoa	35.		
Kaia	41.30		
Kamakee	15.		
Kaiahua	17.		
Jas. H. Kana	370		524.70
		Total	\$275,524.70
Less indebtedness			115,707.18
			\$159,817.52

And the annexed deed marked schedule "A" and made part hereof is a copy of the conveyance to be made by the owners of said business to the proposed corporation.

(Sig.) HENRY HOLMES,
President.
S. M. BALLOU,
Secretary.
C. A. BROWN,
Treas.

Subscribed and sworn to before me this 17th day of July, A. D. 1897.

[Seal]

HARRIET E. WILDER,

Notary Public. [244—187]

SCHEDULE A.

KNOW ALL MEN BY THESE PRESENTS,
That whereas by an instrument in writing dated the second day of July, A. D. 1897, Irene Ii Brown and C. A. Brown, her husband, conveyed to Henry Holmes all those lands, rights, contracts, agreements, live stock, mortgages and notes hereinafter specified upon trust to convey all of the said property to the corporation to be formed according to the conditions herein specified for the only proper use and behoof of the said corporation, and

Whereas, the John Ii Estate, Limited, has been incorporated in accordance with the terms and conditions therein mentioned,

NOW THEREFORE

I, Henry Holmes, Trustee, in consideration of the premises and of One Dollar to me in hand paid by the John Ii Estate, Lt'd, a corporation duly organized under the laws of the Hawaiian Islands, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said John Ii Estate, Limited, all and singular the lands situated in the Hawaiian Islands which immediately prior to the execution of said conveyance of July 2d, 1897, belonging to Irene Ii Brown and C. A. Brown or either of them and all their right, title and interest whether by courtesy, dower or otherwise in and to lands situated in the Hawaiian Islands together with

the partnership agreement dated the 6th day of September, 1893, between C. A. Brown and Lincoln McCandless, also all contracts, agreements whether by lease or otherwise relating to said lands, also all live stock belonging to the said Irene Ii Brown and C. A. Brown or either of them in the Hawaiian Islands, and also all mortgages and notes secured by mortgage at that time held by the said Irene Ii Brown and C. A. Brown or either of them, [245—188] hereby intending to convey all and singular the property of whatever description real, personal or mixed conveyed to me by said deed of July 2d, 1897.

TO HAVE AND TO HOLD all and singular the property above described unto the said John Ii Estate, Limited, its successors and assigns forever.

AND we the said Irene Ii Brown and C. A. Brown hereby consent to, join in, and ratify the above conveyance as being a full and complete discharge of the trust imposed upon the said Henry Holmes by the said Conveyance dated July 2d, 1897, and we further remise, release and quit claim unto the said John Ii Estate, Limited, all our right, title and interest whether by courtesy dower or otherwise in and to the lands and other property hereinabove described.

IN WITNESS WHEREOF, we, the said Henry Holmes, Irene Ii Brown and C. A. Brown have hereunto set our hands and seals this — day of July, A. D. 1897. [246—189]

Territory of Hawaii,
Honolulu, Oahu.

OFFICE OF THE TREASURER.

I do hereby certify that the foregoing document,

is a true and correct copy of the Articles of Incorporation and Affidavit of the John Ii Estate, Limited, with copy of deed to the corporation attached as filed in the Office of the Minister of the Interior on the 20th day of July A. D. 1897, and of record in this office.

That the said document *constitute* the evidence of the incorporation of the John Ii Estate, Limited, filed for record under the provisions of Chapter 127 of the Civil Laws of 1897, relating to Corporations.

HENRY C. HAPAI,

Registrar of Public Accounts.

Territory of Hawaii

(Seal)

Treasurer's Office.

Honolulu, July 12th, 1902. [247—190]

The foregoing instrument was endorsed as follows:
No. 47. United States District Court, Territory of Hawaii. United States of America vs. John Ii Estate, Ltd. an Hawaiian Corporation, et al. Exhibit A. for Respondent John Ii Estate. Dec. 2, 1909. A. E. Murphy, Clerk. A. A. Deas, Deputy Clerk.
[248—191]

**Exhibit No. 6—Translation of a Portion of Will by
N. B. Emerson.**

This is to certify that I, N. B. Emerson of Honolulu, having had submitted to me a typewritten copy in Hawaiian of the will of John Ii, by Magoon & Weaver with the request that I translate that portion of said will relating to devises to be found in section

5 thereof, I would say that the original in Hawaiian submitted to me read as follows:

“Elima O kuu aina kuai oia ka Pa i Pawaa e pili la no me ka Pa o Kauka ma ka aoao ma Waikiki o ke Alanui Aupuni e holo la i Waikiki Kai no A. F. Judd ia Pa oia kona aina a'u e hooili nei.

Ma keia palapala kauoha a'u ua hoonoho aku au, a ke hoonoho nei ia J. Kamoikehuehu A. F. Judd, o laua Elua no hooko kauoha o'u, a mau Luna Hooponopono Waiwai, a he mau Kahu no ke kino, a me ka waiwai o kuu kaikamahine, ka hooilina mua i hoike ia ma keia palapala, o na loa a pau o na aina i hoolimalima ia, a me na loa e ae maluna o na aina a pau o kuu kaikamahine, a hanau paha kana mau keiki, o laua no na hooko kauoha i ka wa e ola ana kuu kaikamahine, a i kana mau keiki aku, e like me kuu makemake i hoike ia ma keia palapala, a e loa no ia laua ka uku elike me ke kanawai.”

The next seven lines I have not translated as immaterial. Then follows the passage:

“Eia hoi ina make kuu kaikamahine, a ua hanau keiki oia, alaila e ili aku no ka waiwai i kana mau keiki, a ina ua make me ke keiki ole, alaila e ili aku no i kona makuahine pono i a ina e make ia e ili hou aku i kuu kaikaina ia J. Kamoekehuehu.”

And having examined the same, I submit the following as my interpretation:

“By this will I have appointed and I do appoint J. Komoikehuehy and A. F. Judd these two to act for me as executors administrators [249—192] and guardians of the person and property of my daughter, the heir first mentioned in this instrument; of

the whole income from the lands that have been leased, and the other incomes from all the lands of my daughter; on these two alone shall devolve this care until she shall have attained majority and perhaps borne children; and they shall be executors during the life of my daughter and for her children after her, according to my wish expressed in this instrument; they to receive payment according to law."

The second paragraph mentioned above, I translate as follows:

"Furthermore, if my daughter dies having borne offspring, then the property shall go to her children; and if she dies without offspring it shall go to her own mother, and at her (the mother's) death it shall go to my brother J. Komoikehuehu."

The foregoing is my translation of that part of the will mentioned.

Honolulu, T. H., July —, 1910.

/S/ N. B. EMERSON.

[Endorsed]: 45. #47. Translation of Portion of Will of John Ii by N. B. Emerson July, 1910. Filed, Jul. 25, 1910, at o'clock and — minutes — M. A. E. Murphy, Clerk. By /S/ F. L. Davis, Deputy Clerk. [250—193]

**Exhibit No. 7—Translation of a Portion of Will by
O. H. Gulick.**

Having been requested by Magoon & Weaver to translate a portion of the Will of John Ii which refers to devises to his daughter, I would say that I have had before me a copy of the said Will and the

portion that I have translated to read in Hawaiian as follows:

“Elima O kee aina kuai oia ka Pa i Pawaa e pili la no me ka Pa o Kauka ma ka aoao ma Waikiki o ke Alanui Aupuni e holo la i Waikiki Kai no A. F. Judd ia Pa oia kona aino a'u e hooili nei.

Ma keia palapala kauoha a'u ua hoono ho aku au, a ke hoono ho nei ia J. Komoikehuehu A. F. Judd, o laua Elua na hooko kauoha o'u, a mau Luna Hooponopono Waiwai, a he mau Kahu no ke kino, a me ka waiwai o kuu kaikamahine, ka hooilina mua i hoike ia ma keia palapala, o na Ioaa a pau o na aina i hoolimalima ia, a me na loaa e ae maluna o na aina a pau o kuu kaikamahine, (me laua wale no ka malama a hiki i kona wa e kanaka makua ai, a hanau paha kana mau keiki, o laua no no hooko kauoha i ka wa e ola ana kuu kaikamahine, a i kana mau keiki aku,) e like me kuu makemake i hoike ia ma keia palapala, a e loaa no ia laua ka uku elike me ke kanawai.”

The next seven lines I have not translated as immaterial. Then follows the passage:

“Eia hoi ina make kuu kaikamahine, a ua hanua keiki oia, alaila e ili aku no ka waiwai i kana mau keiki, a ina ua make me ke keiki ole, alaila e ili aku no i kona ua makuahine pono i a ina e make ia e ilihou aku i kuu kaikaina ia J. Kamoekehuehu.”

And having examined the same, I submit the following as my interpretation: (First Paragraph.)

Doubtless this word should be J. Komoikehuehu.

[251—194]

Fifth. My purchased land namely the enclosure at Pawaa adjoining the enclosure of Kauka (Doctor

Judd) on the Waikiki side of the government road and lying toward Waikiki-kai this enclosure being the property of A. F. Judd, this is the land I hereby bequeath.

In this my will I have appointed, and hereby do appoint J. Komoikehuehu (and) A. F. Judd, they two are my executors and agents for my property and guardians of the person and property of my daughter, the heir above mentioned in this document, all rentals on leased lands, and all other receipts from all the lands of my daughter, are placed in their sole keeping until she shall become of age, or until she may bear children, they are the executors during the life of my daughter, and of her children, according to my wish *wish* expressed in this document, and they shall be paid as provided by law.

The second paragraph I translate as follows, (mentioned above).

And also, if my daughter upon her decease shall have borne children, then the property shall descend to her posterity, but if she should die without issue then it falls to her own mother, and if the mother die it descends to my younger brother, J. Kamoekuehu.

Komoikehuehu.

The foregoing is my translation of that part of the Will mentioned.

Honolulu, T. H., July 18, 1910.

/S/ O. H. GULICK.

[Endorsed]: \$—— 46. #47. Translation of the Will of John Ii by O. H. Gulick, Filed Jul. 25, 1910, at —— o'clock and —— minutes —— M. A. E.

Murphy, Clerk. By /S/ F. L. Davis, Deputy Clerk.
[252—195]

**Exhibit No. 8—Translation of a Portion of Will by
W. R. Castle.**

BEFORE THE ALL POWERFUL GOD AMEN.

I, JOHN II, of the City of Honolulu, Island of Oahu, Hawaiian Islands. I have made and do hereby make my instrument directing heirs (will), in order to make it generally known, because this is my last will. After the payment of all my debts, all of my real property and all of my personal property shall descend to my heirs made known below as follows:

FIRST. Irene Haalou Ii, my own daughter, is the first heir, as follows: (Names several lands) and the half of all personal property.

SECOND. My married wife, Maraea Ii, is the second heir; a land in Hilo, it is the Kuleana of Lumaina, received by purchase; an ili of land of Makau, in Koolauloa, Oahu, and the half of all personal property: but if she marries a new husband these islands shall return to my daughter, she may not devise to others.

THIRD. My younger brother, J. Komoikehuehu, the Guardian (or trustee) of the heirs, one ili aina of Homaikaia down at Waipio, with one land purchased the half of Auiole at Waikele Ewa Oahu, and also one ili aina of Kaluapulu Kalihi Oahu, these are his lands which I hereby devise.

FOURTH. My share in the land of G. Naaihelu, my younger brother deceased, it shall pertain to his

wife Kamealani.

FIFTH. My purchased land, which is the lot at Pawaa, adjoining the lot of Kauka, on the Waikiki side of the Government road running to Waikiki Kai, to A. F. Judd, this land I devise to him.

In this will of mine, I have appointed, and hereby do appoint J. Komoikehuehu, A. F. Judd, they two are my executors and the administrators, and the guardians of the person and the property of my daughter and the first heir made known in this instrument. [253—196]

All the receipts of the leased lands, and other receipts from all the lands of my daughter, they two shall have the care of until she reaches maturity, or till she bears children. They shall be executors during the life of my daughter and of her children thereafter, in accordance with my desire made known in this instrument, and they shall receive the pay according to law.

And my executors shall place my daughter in a proper place to be taught wisdom in both languages and my child shall be led in the paths of righteousness, and the first fruits to be received from the lands of the girl, this being money received, there shall be taken ten cents from each dollar, which shall be sacred to the Kingdom of God; and in accordance with my custom, my executors shall carry out this direction of mine.

But if my daughter shall die, and shall have had issue, the property shall descend to her children, and if she dies without a child, then it shall descend to her own mother, but if she shall die it shall descend

to my younger brother, J. Komoikehuehu.

IN WITNESS, etc., etc.

(This will was executed April 28, 1870.)

The foregoing is a translation made by me from a copy of John Ii's will, this 7th day of July, 1910.

/S./ W. R. CASTLE.

[Endorsed]: 47. #47. Translation of Will of John Ii. Prepared by W. R. Castle. Filed Jul. 25, 1910, at — o'clock and — minutes — M. A. E. Murphy, Clerk. By /S./ F. L. Davis, Deputy Clerk. [254—197]

Exhibit No. 9—Translation of a Portion of Will by Joseph M. Poepoe.

Having been requested by Magoon & Weaver to translate a portion of the Will of John Ii which refers to devises to his daughter, I would say that I have had before me a copy of the said Will and the portion that I have translated reads in Hawaiian as follows:

“Elima O kuu aina kuai oia ka Pa i Pawaa e pili la no me ka Pa o Kauka me ka aoao ma Waikiki o ke Alanui Aupuni e holo la i Waikiki Kai no A. F. Judd ia Pa oia kona aina a'u e hooili nei.

“Ma keia palapala kauoha a'u ua hoonoho aku au, a ke hoonoho nei ia J. Komoikehuehu, A. F. Judd, o laua Elua na hooko kauoha o'u, a mau Luna Hooponopono Waiwai, a he mau Kahu no ke kino, a me ka waiwai o kuu kaikamahine, ka hooilina mua i hoike ia ma keia palapala, o na loa a pau o na aina i hoolimalima ia, a me na loa a ae maluna o na aina

a pau o kuu kaikamahine, me laua wale no ka malama a hiki i kona wa e kanaka makua ai, a hanau paha kana mau keiki, o laua no na hooko kauoha i ka wa e ola ana kuu kaikamahine, a i kana mau keiki aku, e like me kuu makemake i hoike ia ma keia palapala, a e loa no ia laua ka uku elike me ke kana-wai."

The next seven lines I have not translated as immaterial. Then follows the passage:

"Eia hoi ina make kuu kaikamahine, a ua hanau keiki oia, alaila e ili aku no ka waiwai i kana mau keiki, a ina ua make me ke keiki ole, alaila e ili aku no i kona makuahine pono i ina e make ia, ili hou aku i kuu kaikaina ia J. Kamoeke huehu."

As my translation of that portion of the will marked "A," I submit the following:

"Fifth; The land which I purchased, a lot at Pawaa, adjoining to the lot of Kauka (Judd) on the Waikiki side of the [255—198] Government Road running down towards Waikiki kai belongs to A. F. Judd, that is his land which I now bequeath.

In this Will of mine, I have appointed, and do appoint J. Komoikehuehu, A. F. Judd, they two to be my executors and administrators, and guardians of the person and property of my daughter, the first devisee mentioned in this Will, all receipts from the lands now leased, and other receipts derived from all the lands of my daughter, they two only to keep it until she comes to maturity, or perhaps shall give birth to any children they shall be the executors while my daughter is living, and that of

her children, in compliance with my wish as stated in this document, and they shall receive for their compensations in conformity to law.

As my translation of the second Native portion above stated, (b), I submit the following:

Provided however, if my daughter shall die, and that she had begotten some children, then, the property shall descend to her children, and, if she dies without children, then, (the property) shall descend to her (own) mother; and, if she is dead, the property shall descend again to my brother to J. Komoikehuehu.

Honolulu, T. H., July 14, 1910.

/S/ JOSEPH M. POEPOE.

[Endorsed]: 48. #47. Translation of part of Will of John Ii by J. M. Poepoe. Filed Jul. 25, 1910, at — o'clock and, — minutes — M. A. E. Murphy, Clerk. By /S/ F. L. Davis, Deputy Clerk. [256—199]

**Exhibit No. 10—Translation of a Portion of Will by
Henry Smith.**

Having been requested by Morgan & Weaver to translate a portion of the Will of John Ii which refers to devises to his daughter, I would say that I have had before me a copy of the said Will and the portion that I have translated to read in Hawaiian as follows:

“Ma keia palapala kauoha a'u ua hoonoho aku au, a ko hoonoho nei ia J. Komoikehuehu A. F. Judd, o laua Elua na hooko kauoha o'u, a mau Luna Hoo-

ponopono Waiwai, a he mau Kahu no ke kino, a me ka waiwai o kuu kaikamahine, ka hooilina mua i hoike ia ma keia palapala, o na loa a pau o na aina i hoolimalima ia, a me na loa e ae maluna o na aina a pau o kuu kaikamahine, me laua wale no ka malama a hiki i kona wa e kanaka maukua ai, a hanau paha kana mau keiki, o laua no na hooko kauoha i ka wa e ola ana kuu kaikamahine, a i kana mau keiki aku, e like me kuu makemake i hoike ia ma keia palapala, a e loa no ia laua ka uku elike me ke kanawai."

I have read the remainder of the Will, as my translation of the portion of the Will quoted above, I submit the following of the correct translation into the English language.

"By this instrument of mine I have constituted and do hereby appoint J. K. Komoikehuehu, A. F. Judd, they two are my executors, and administrators of the estate, and they are the guardians of the person and estate of my daughter, the first named devisee in this instrument: all income from lands leased, and other revenue derived from all the lands of my daughter, they alone shall keep until she comes of age or gives birth to children; they are the executors at the time my daughter is living or (and) her children posterior, according to my wish shown in this instrument and for which they shall receive pay according to law."

I have had my attention called to the translation of the [257—200] will said to have been made by Rev. H. H. Parker. As quoted to me his translation of a portion of the above paragraph is as follows: * * * with these two alone is invested the

care (of my daughter) until she comes of age and in the event of her giving birth to children, the same two (o laua no) shall be the administrators during the lifetime of my daughter and to her children following, in accordance with my wish which is to make known in this document. * * * Further, if my daughter should die leaving issue then the property shall descend to her children, but if she dies childless then it shall descend to her own mother, and at her death it shall go to my younger brother J. Komoikehuehu.

I have examined the Hawaiian original of the phrase, "and in the event of her giving birth to children." I note that this translation of "a hanau paha kana mau keiki," removes an inconsistency in the terms of the will at this point, but I have considered my translation and a portion of the words, "a hanau paha." I believe that my translation is the correct one. I do not think that word "paha" is equivalent to the word "or" in this connection. I am of the opinion that the word "a" in this connection cannot be used in this equivalent to the word "ina." I think that Mr. Parker's translation in this matter is incorrect, because it is not to be based upon the correct interpretation of the Hawaiian original.

Dated Honolulu, T. H., July 20, 1910.

Respectfully submitted,

/S/ HENRY SMITH.

[Endorsed]: 49. #47. John Ii Will. Translated by Henry Smith of portion July 20, 1910. Filed Jul. 25, 1910, at — o'clock and — minutes

— M. A. E. Murphy, Clerk. By /S/ F. L. Davis, Deputy Clerk. Magoon & Weaver, Attorneys for Defendant. [258—201]

**Exhibit No. 11—Translation of a Portion of Will by
C. L. Hopkins.**

They alone shall have the care until she becomes woman grown, or until in case she has children, they shall be the executors during the lifetime of my daughter and to her children thereafter.

“They alone shall have the care until she becomes woman grown, or in case she has children, they shall be the executors during the lifetime of my daughter and to her children thereafter.”

From the explanation given me by Judge Dole as to the discrepancy existing in the paragraph of the Will in which the above translation appears I feel that the word “paha” is the governing word which will harmonize the apparent discrepancy. “Paha” in Hawaiian means “if”—“perhaps”—“in case”—in English, so by the use of the words “in case” this harmonizes the apparent discrepancy in my judgement.

In my translation of the Will of John Ii submitted, I was unaware of the true nature of the discrepancy as the same was not pointed out to me and hence my translation was made as submitted by me.

/S/ C. L. HOPKINS,

Hawaiian Translator. [259—202]

Having been requested by Magoon & Weaver to translate a portion of the will of John Ii which re-

fers to devises to his daughter, I would say that I have had before me a copy of the said will and the portion that I have translated reads in Hawaiian as follows:

“Elima O kuu aina kuai oia ka Pa i Pawaa e pili la no me ka Pa o Kauka ma ka aoao ma Waikiki o ke Alanui Aupuni e holo la i Waikiki Kai no A. F. Judd ia Pa oia kona aina a'u e hooili nei.

(a) “Ma keia palapala kauoha a'u ua hoono ho aku au, a ke hoono ho nei ia J. Kamoikehuehu A. F. Judd, o laua Elua na hooko kauoha o'u, a mau Luna Hooponopono Waiwai, a he mau Kahu no ke kino, a me ka waiwai o kuu kaikamahine, ka hooilina mua i hoike ia ma keia palapala, o na loa a pau o na aina i hoolimalima ia, a me na loa e ae maluna o na aina a pau o kuu kaikamahine, me laua wale no ka malama a hiki i kona wa ekamaka maukua ai, a hanau paha kana mau keiki, o laua no na hooko kauoha i ka wa e ola ana kuu kaikamahine, a i kana mau keiki aku, e like me kuu makemake i hoike ia ma keia palapala, a e loa no ia laua ka uku elike me ke kanawai.”

The next seven lines I have not translated as immaterial. Then follows the passage:

(b) “Eia hoi ina make kuu kaikamahine, a ua hanau keiki oia, alaila e ili aku no ka waiwai i kana mau keiki, a ina ua make me ke keiki ole, alaila e ili aku no i kona makuahine pono i a ina e make ia e ili hou aku i kuu kaikaina ia J. Kamoekehuehu.”

As my translation of that portion of the will marked “a,” I submit the following:

“Fifth. By this will of mine, I have constituted

and do appoint J. Kamoikehuehu A. F. Judd, they to be my executors, and administrators, and guardians of the person, and estate of my daughter, the first heir mentioned in this will; all of the proceeds from the lands leased, and all other receipts [260—203] from the lands of my daughter, they alone shall care for until she becomes matured a woman grown or begets children, they two shall be the executors while my daughter is alive, and for her children thereafter in accordance with my wish expressed in this will and they shall receive compensation according to law."

As my translation of the second Native portion above stated, (b) I submit the following:

"Also, if my daughter shall die, and she should have issue, then the estate shall descend to her children, or should die without issue, then to descend to her own mother, and if she should die to again descend to my younger brother, J. Komoikehuehu."

Honolulu, T. H., July 5, 1910.

/S/ C. L. HOPKINS.

Official Hawaiian Interpreter, First Circuit Court,
First Judicial Circuit.

[Endorsed]: 50. #47. Translation of Portion of Will of John Ii by C. L. Hopkins. Filed Jul. 25, 1910, at — o'clock and — minutes — M. A. E. Murphy, Clerk. By /S/ F. L. Davis, Deputy Clerk. [261—204]

**Exhibit No. 12—Translation of a Portion of Will by
S. Keliinoi.**

By this Will of mine I have appointed, and I do appoint J. Komoikaehuehu A. F. Judd (the two of them) to be my Executors, and Administrators of the property, and Guardians of the body and the property of my daughter, the heir first mentioned in this instrument, all receipts from the lands which have been leased, and other incomes (derived) from all the lands of my daughter, they only shall keep until she (has attained womanhood) is of age, or she has borne children, they shall be the Executors during the lifetime of my daughter and her children as my desire expressed in this instrument, and they shall receive compensation as provided by law."

The next portion I have translated as follows:

"Should my daughter die, and she has children, then shall the property devolve on her children, but should she die without issue, then shall it devolve on her mother, and should she die then shall it again devolve on my younger brother J. Komoikaehuehu."

Comment.

To translate the phrase "a hanau paha kana mau keiki" "should she have children" would be stretching the language quite a bit. Had it been the intent of the Testator to make it conditional upon her bearing children, he would have used the following expression or something similar to it, "a i hanau auanei kana mau keiki." There is no idea of any condition in the phrase "a hanau paha kana mau keiki." To

my mind, the Testator is simply setting down the event of her having children as another time for the Executors to carry out certain instructions, the other time being the date of her attaining her majority.

/S/ S. KELIINOI.

Honolulu, T. H., August 1st, 1910. [262—205]

Having been requested by Magoon & Weaver to translate a portion of the Will of John Ii which refers to devises to his daughter, I would say that I have had before me a copy of the said Will and the portion that I have translated to read in Hawaiian as follows:

“Elima O kuu aina kuai oia ka Pa i Pawaa e pili la no me ka Pa o Kauka ma ka aoao ma Waikiki o ke Alanui Aupuni e holo la i Waikiki Kai no A. F. Judd ia pa oia kona aina a'u e hooili nei.

Ma keia palapala kauoha a'u ua hoonoho aku au, a ke hoonoho nei ia J. Komoikaehuehu A. F. Judd, o laua elua na Hooke Kauoha o'u, a mau Luna Hoonopono Waiwai, a he mau kahu no ke kino, a me ka waiwai o kuu kaikamahine, ka hooilina mua i hoike ia ma keia palapala, o na loa a pau o na aina i hoolimalima ia, a me na loa e ae maluna o na aina a pau o kuu kaikamahine, me laua wale no ka malama a hiki i kona wa e kanaka makua ai, a hanau paha kana mau keiki, o laua no ka Hooke Nauoha i ka wa e ola ana kuu kaikamahine, a i kana kau keiki aku, e like me kuu makemake i hoike ia ma keia palapala, a e loa no ia laua ka uku e like me ke kanawai.”

The next seven lines I have not translated as im-

material. Then follows the passage:

“Eia hoi ina make kuu kaikamahine, a ua hanau keiki oia, alaila e ili aku no ka waiwai i kna keiki, a ina ua make me ke keiki ole, alaila e ili aku no i kona makuahine pono i a ina make ia e ili hou aku i kuu kaikaina ia J. Komoikaehuehu.”

And having examined the same, I submit the following as my translation:

“Fifth: My land which I bought and which is the yard at Pawaa adjacent to the yard of Kauka (Judd) on the Waikiki side of the Government road going to Waikiki Kai said yard to be for A. F. Judd, this is the land which I am bequeathing to him.”

[Endorsed]: 52. #47. United States vs. John Ii Estate, Ltd. Translation of Portion of Will of John Ii, by S. Keliinoi. Introduced on Behalf of John Ii Est. Ltd., and Received Aug. 2/10. /S/ O. P. Soares Reporter. Filed, August 2, 1910, at — o'clock and — minutes — M. A. E. Murphy, Clerk. By /S/ F. L. Davis, Deputy Clerk. [263—206]

**Exhibit No. 13—Translation of a Portion of Will by
Wm. Hyde Rice.**

Having been requested by Magoon & Weaver to translate a portion of the Will of John Ii which refers to devises to his daughter, I would say that I have had before me a copy of the said Will and the portion that I have translated reads in Hawaiian as follows:

“Elima O kuu aina kuai oia ka Pa i Pawaa e pili

la no me ka Pa o kauka ma ka aoao ma Waikiki o ke Alanui Aupuni e holo la i Waikiki Kai no A. F. Judd ia Pa oia kona aina a'u e hooili nei.

“Ma keia palapala kauoha a'u ua hoono ho aku au, a ke hoono ho nei ia J. Komoikehuehu A. F. Judd, o laua Elua na hooko kauoha o'u, a mau Luna Hooponopono Waiwai, a he mau Kahu no ke kino, a me ka waiwai o kuu kaikamahine, ka hooilina mau i hoike ia ma keia palapala, o na loa a pau o na aina i hoolimalima ia, a me na loa e ae maluna o na aina a pau o kuu kaikamahine, me laua wale no ka malama a hiki i kona wa e kanaka maukua ai, a hanau paha kana mau keiki, o laua no na hooko kauoha i ka wa e ola ana kuu kaikamahine, a i kana mau keiki aku, e like me kuu makemake i hoike ia ma keia palapala, a e loa no ia laua ka uku elike me ke kanawai.”

The next seven lines I have not translated as immaterial. Then follows the passage:

“Eia hoi ina make kuu kaikamahine, a ua hanau keiki oia, alaila e ili aku no ka waiwai i kana mau keiki, a ina ua make me ke keiki ole, alaila e ili aku no i kona makuhine pono i a ina e make ia e ili hou aku i kuu kaikaina ia J. Komoikehuehu.”

As my translation of that portion of the Will marked “A,” I submit the following:

Fifth. The land that I bought that is the lot in Pawaa adjoining the lot of the Doctor on the Waikiki side of the Government Road leading to Waikiki Kai. That lot shall belong to A. F. Judd. That is the lot of land I bequeath to him. [264—207]

By this will of mine I appoint and do appoint J.

Komoikehuchu A. F. Judd, those two shall be my Executors and Administrators of my property, and they shall be Guardians of the Body and of the Property of my daughter, the one who shall be heir of all my Property under this will. All receipts from leases or rents or any other receipt of any of the lands of my Daughter, they two only shall have charge of the same till she shall become of age, or till she should have children, they shall be the Executors during the life of my daughter and her children after her, like my wish expressed in this will, they shall receive their pay according to the Law.

As my translation of the second Native portion above stated, marked "B," I submit the following:

Now if my daughter dies, and she has given birth to children, then the Property shall descend to her children, if she should die without children then the Property shall be left to her own mother, if she should die then the property shall go to my younger brother, J. Komoikehuchu.

/S/ WM. HYDE RICE.

Dated Lihue, Kauai, T. H., July 21, 1910.

[Endorsed]: 53. #47. United States vs. John Ii Estate. Translation of Will of John Ii, by Wm. Hyde Rice. Filed August 3, 1910, at — o'clock and — minutes — M. ———, Clerk. By /S/ F. L. Davis, Deputy Clerk. Introduced by Magoon & Weaver on Behalf of John Ii Estate, and received August 3, 1910. /S/ O. P. Soares, Reporter. [265—208]

**Exhibit No. 14—Translation of a Portion of Will by
Francis Gay.**

Having been requested by Magoon & Weaver to translate a portion of the Will of John Ii which refers to devises to his daughter, I would say that I have had before me a copy of the said Will and the portion that I have translated reads in Hawaiian as follows:

“Elima O kuu aina kuai oia ka Pa i Pawaa e pili la no me ka Pa o kauka ma ka aoao ma Waikiki o ke Alanui Aupuni e holo la i Waikiki Kai no A. F. Judd ia Pa oia kona aina a'u e hooili nei.

“Ma keia palapala kauoha a'u ua hoonoho aku au, a ke hoonoho nei ia J. Komoikehuchuu A. F. Judd, o laua Elua na hooko kauoha o'u, a mau Luna Hoonoponono Waiwai, a he mau Kahu no ke kino, a me ka waiwai o kuu kaikamahine, ka hooilina mau i hoike ia ma keia palapala, o na loa a pau o na aina i hoolimalima ia, a me na loa e ae maluna o na aina a pau o kuu kaikamahine, me laua wale no ka malama a hiki i kona wa e kanaka makua ai, a hanau paha kana mau keiki, o laua no na hooko kauoha i ka wa e ola ana kuu kaikamahine, a i kana mau keiki aku, e like me kuu makemake i hoike ia ma keia palapala, a e loa no ia laua ka uku elike me ke kanawai.”

The next seven lines I have not translated as immaterial. Then follows the passage:

“Eia hoi ina make kuu kaikamahine, a ua hanau keiki oia, alaila e ili aku no ka waiwai i kana mau

keiki, a ina ua make me ke keiki ole, alaila e ili aku no i kona makuahine pono i a ina e make ia e ili hou aku i kuu kaikaina ia J. Komoikehuehu."

And having examined the same, I submit the following as my interpretation:

By this will of mine I have appointed and do appoint J. Komoikehuehu (A. F. Judd to be my executors and administrators [266—209] and to be the Trustee of the person and property of my daughter the real continuous heirs (or Trustees) as shown in this document *document*, all income derived from property under lease, and all other income from the lands of my daughter, shall be under their sole control until she is of age, and perhaps has issue, and they are to be the executors (Trustees) during the lifetime of my daughter, and her children (issue) after her, in accordance with my desires as expressed in this document, and they shall receive their compensation according to law.

Also if my daughter dies and has issue then the property shall descend to her issue, and if she has died without issue, then it shall descend to her mother, and if she (mother) dies, it shall descend to my brother J. Komoikehuehu.

I have not translated "Elima, o kuu aina kuai oia ka pa i Pawaa" devised to A. F. Judd as there does not seem to be any doubt to what this means.

The old *hawaiians* would in saying Wait for me until Wednesday, would express themselves thus, Wait for me until Monday, Tuesday and Wednesday. And so in this will, the trustees were to hold the property until the death of the daughter, or until the

death of her issue, if any. The words "Maturity, and perhaps issue," are used as Monday, and Tuesday is in the foregoing paragraph, and in our days would be left out altogether.

The foregoing is my translation of that part of the Will mentioned.

Makawei Kauai, T. H., July 25, 1910.

/S/ FRANCIS GAY.

[Endorsed]: 54. #47. Filed August 3d, 1910, at — o'clock and — minutes — M. A. E. Murphy, Clerk. By /S/ F. L. Davis, Deputy Clerk. United States vs. John Ii Estate. Translation of Portion of Will of John Ii by Francis Gay. Introduced by Magoon & Weaver on Behalf of John Ii Estate, and received August 3, 1910. /S/ O. P. Soares, Reporter. [267—210]

**Exhibit No. 15—Translation of a Portion of Will by
Emma M. Nakuina.**

Having been requested by Magoon & Weaver to translate a portion of the Will of John Ii which refers to devises to his daughter, I would say that I have had before me a copy of the said Will and the portion that I have translated reads in Hawaiian as follows:

"Elima o kuu aina kuai oia ka Pa i Pawaa e pili la no me ka Pa o Kauka ma ka aoao ma Waikiki o ke Alanui Aupuni e holo la i Waikiki Kai no A. F. Judd ia Pa oia kona aina a'u e hooili nei.

"Ma keia palapala kauoha a'u ua hoonohe aku au, a ke hoonohe nei ia J. Kamoikehuhu A. F. Judd, o

laua Elua no hooko kauoha o'u, a mau Luna Hooponopono Waiwai, a he mau Kahu no ke kino, a me ka waiwai o kuu kaikamahine, ka hoolilina mau i hoike ia ma keia palapala, o na loaa e ae maluna o na aina i hoolimalima ia, a me na loaa e ae maluna o na aina a pau o kuu kaikamahine, me laua wale no ka malama a hiki i kona wa e kanaka maukua ai, a hanau paha kana mau keiki, o laua no na hooko kauoha i ka wa e ola ana kuu kaikamahine, a i kana mau keiki aku, e like me kuu makemake i hoike ia ma keia palapala, a e loaa no ia laua ka uku elike me e kanawai."

The next seven lines I have not translated as immaterial. Then follows the passage:

"Eia hoi ina make kuu kaikamahine, a ua hanau keiki oia, alaila e ili aku no ka waiwai i kana mau keiki, a ina ua make me ke keiki ole, alaila e ili aku no i knoa ua make ia e ili hou aku i kuu kaikaina ia J. Komoikehuehu."

And having examined the same, I submit the following as my interpretation: (First Paragraph.)

Fifthly. My bought land which is the land or (lot) in Pawaa adjoining the Lot of Kauka (Judd's?) on the Waikiki side of the government road running to Waikiki, that is to be A. F. [268—211] Judd's lot that is to be his land that I am bequeathing. (To him.)

In this Will of mine I have appointed and do hereby appoint J. Komoikehuehu A. F. Judd for them two to be my executors and administrators of property and to be the guardians of the person and property of my daughter, the perpetual or (residu-

ary) legatee as shown by this instrument and all the incomes from the leased lands and any other receipts (or monies) from all the lands of my daughter, they alone to have the care until she is of age, or when she should have children. (Literal, "when perhaps she should give birth to children"), they two to be the executors during the lifetime of my daughter and also of her children, in accordance with my desire as shown in this instrument (paper), and they are to be paid as the law directs."

The second paragraph I translate as follows, (mentioned above).

There is this, if my daughter should and having given birth to children then the property is to descend to her children, and if she should die without children, then she being dead, the property is to descend to my younger relation J. Komoikehuchu."

The foregoing is my translation of that part of the Will mentioned.

Honolulu, T. H., Aug. 2nd, 1910.

/S/ EMMA M. NAKUINA.

[Endorsed]: 55. #47. Filed Aug. 5, 1910. Translation of Will of John Ii, by Emma M. Nak-uina. Filed August 5th, 1910, at — o'clock and — minutes — M. A. E. Murphy, Clerk. By F. L. Davis, Deputy Clerk. [269—212]

**Exhibit No. 16—Translation of Portion of Will by
H. H. Parker.**

* * * * * with these two above is invested the care (of my daughter) until she comes of age, and in

the event of her giving birth to children, the same two (o laua no) shall be the administrators during the lifetime of my daughter and to her children following, in accordance with my wish which is made known in this document. * * * * *

Further, if my daughter should die leaving issue then the property shall descend to her children, but if she dies childless then it shall descend to her own mother, and at her death it shall go to my younger brother, J. Komoikehuehu. [270—213]

My Dear Mr. Dole:

Enclosed please find translations of the two passages in Ii will which you pointed out to me yesterday. I trust you will find them of use to you in your endeavor to arrive at a true interpretation of the will.

Yours,

/S/ H. H. PARKER.

June 17, '10.

[Endorsed]: 51. #47. Translation of Portion of the Will of John Ii by H. H. Parker. Filed Jul. 25, 1910, at — o'clock and — minutes — M. A. E. Murphy, Clerk. By /S/ F. L. Davis, Deputy Clerk. [271—214]

*In the United States District Court in and for the
District and Territory of Hawaii.*

At Chambers.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN II ESTATE, LIMITED,

Defendant.

**Transcript of Evidence in the U. S. District Court
in and for the District and Territory of Hawaii
in Cause Entitled The United States of America,
Plaintiff, vs. The John Ii Estate, Limited,
Defendant.**

APPEARANCES:

**J. ALFRED MAGOON and P. L. WEAVER, of
the Firm of MAGOON & WEAVER, for the
John Ii Estate.**

**A. A. WILDER, of the Firm of THOMPSON,
CLEMONS & WILDER, for the Heirs of John
Ii.**

[Testimony of S. Keliinoi, for John Ii Estate.]

Transcript of evidence of S. KELIINOI, a witness
called for John Ii Estate, and sworn.

Mr. MAGOON.—Your name is S. Keliinoi?

WITNESS.—S. Keliinoi.

Q. I have read a translation of a portion of the
will of John Ii. Was that translation made by you?

A. Yes.

Q. And this comment at the end of the transla-
tion, is that your view with reference to the reason of
the translation?

A. I made that comment, yes.

Q. I will ask you whether or not there was a con-
dition meant [272—215] to be expressed here in
this will, there would have been any change in the
punctuation from what you find it here in the will,
if there had been any intention to create a condition?

A. The punctuation— There is a comma— If

(Testimony of S. Keliinui.)

you remember, there is a comma after the word "i kona wa e kanaka maukua ai," There is a comma there, you notice. "I kona wa e kanaka maukua ai," If there had been an idea of condition, "should she have children," there would be a full stop there, a semicolon or a period, after that "kanaka maukua ai."

Q. Is there any other word which should have been introduced there to have created a condition, besides the words—

A. Certainly. If there is a condition wanted there, "a hanau paha kana mau keiki alaila," The word "alaila" should have gone in there.

Q. Then, the words "alaila" would be necessary to express a condition. Is there not any other word which expresses the condition too, besides "alaila"? How about the word "ina"?

A. "Ina" would come first part.

Q. The word "aunei" would be equivalent to the word Wina?"

A. Yes. They are used the same. "Alaila" comes in just the same.

Q. "Ina e haunau kana mau keiki." It would be equivalent to the expressions I have used?

A. But in either case the word "alaila" would have to come in.

Cross-examination.

Mr. WILDRED.—Is your translation of this will made in connection with all the other provisions, or have you only taken this paragraph?

A. I read the whole will and took this paragraph

(Testimony of S. Keliinoi.)

as being the one to be translated.

Q. But did you translate it in connection with the other [273—216] provisions?

A. No, sir. This was translated— This portion is the only one I translated. I understand what you mean now, in reference to the other parts of the will.

Q. Yes?

A. Yes. The general idea of the will, I translated that with the general idea of the will.

Q. That is, whether or not you translated this part—portion, in connection with the other portions?

A. I tried to.

Mr. WILDER.—I haven't any other question.

The COURT.—You say, on the other theory, if there would have been a semicolon or a period—do you notice who the parties that witnessed this will were? A. I don't remember their names.

Q. They are, D. B. Mahoe, an old Hawaiian lawyer, the brother of John Ii; John Ii himself, who was a Judge; and, Kahanu. Do you think those Hawaiian lawyers were possessed of the correct theory of the stops that are used in the English language?

A. Perhaps they were not, but I think they understood enough Hawaiian in those days to express their idea the other way if they mean the other way. I took it that most of them were Lahainaluna men and they were pretty well up in Hawaiian.

Q. Did you notice the inaccuracy between the sentence before this disputed translation and the sentence after?

A. You refer to "o laua no na hooko kanoha i ka

(Testimony of S. Keliinai.)

wa e ola ana kuu keiki mahine a i kana mau keiki aku, e like me kuu makemake i hoike ia ma keia palapala, a e loa no ia laua ka uku elike me ke kana-wai"?

Q. Yes. That is the sentence following. And the sentence before the words "o laua."

A. Yes.

Q. Did you notice that disagreement? [274—
217]

A. I noticed the fallacy in the construction.

Q. No, disagreement. Absolute disagreement?

A. Yes.

Q. Did you notice that? A. Yes.

Q. Did that have any effect on your mind?

A. I don't think so, considering the way the sentence before is constructed. Then comes that funny construction, again, "o laua no na hooko kauoha i ka wa e ola ana kuu kaikamahine." The same idea is carried right through there.

Q. Then, it comes down to this part and he says, "They two to have the receipts of the lands during or until, she is of age or, according to your translation, "give birth to children, they two to be the trustees or executors during the lifetime of my daughter and her children after." Now, here is an absolute denial of the words "a hiki," did you notice that?

A. Yes, I notice that.

Q. And you didn't succeed in adjusting those—

A. I *scecd* to me this way: that there was a time set for the trustees to carry out certain instructions. Those times were the time when she becomes of age

(Testimony of S. Keliinui.)

or in case she has children before she becomes of age, one of those times when the trustees will fulfill certain conditions, "but at the same time," etc., is giving the trustees the right to hold on to their trust.

Q. How can they hold on if they only have the right in the first sentence, only until she is of age or—

A. I don't know.

Q. Well, now, isn't the Hawaiian language a very much less exact language than English?

A. Oh, yes, very much so.

Q. Are not the sentences in the vernacular in the Hawaiian very vague and incomplete so a white man who understands Hawaiian finds it difficult to follow a conversation?

Q. Well, you may not find it hard to say, but you may find it hard to find out what they mean. [275—218]

Q. That is what I say. Isn't the arrangement of words and the use of words quite vague in the original Hawaiian among themselves so that an Hawaiian would understand what another Hawaiian says from his familiarity from his childhood of their methods, where a white man would find difficulty?

A. I think that's true.

Q. Doesn't that feature of the Hawaiian language leave some word open to— Translate these words, "a hanau." Is it not a word which will make those two sentences before and after count for something?

A. I don't think so.

Q. Mr. Magoon has questioned you about a contingency, how about an alternative; and if it is so and

(Testimony of S. Keliinui.)

so, if certain things happen. In the alternative: if a different thing happens, then it is so and so.

A. I don't see how you can possibly take it that way.

Q. Well, does— What's the word "paha" put in there for? Why don't it read, "a hanau kana mau keiki?" Of course, you may explain there he may have meant children being of age.

A. Yes.

Mr. MAGOON.—I offer that (the witness' written translation of portion of the will) in evidence. RECEIVED IN EVIDENCE.

[Testimony of C. L. Hopkins, for John Ii Estate.]

Direct examination of C. L. HOPKINS, a witness called on behalf of John Ii Estate, sworn.

Mr. MAGOON.—Your name is C. L. Hopkins?

A. Yes.

Q. And you are the Hawaiian Interpreter for the Circuit Court of the First Circuit?

A. Yes, I am.

Q. You have translated the will, have you not, of John Ii?

A. I have.

Q. This is your translation, the one that I hold in my hand here?

A. Yes. [276—219]

Q. In the fifth paragraph of this will you have translated, you have used these words, "all the proceeds from the lands leased, and all other receipts from the lands of my daughter, they alone shall care for until she becomes matured," in the alternative, "a woman grown," "or begets children." Will you kindly give your reasons for that translation, "or

(Testimony of C. L. Hopkins.)

begets children”?

The COURT.—He wants to know why you translated it that way. You can answer that easy enough.

A. It may be that I have omitted the word “paha,” or in case she begets children.”

Q. I would like to— I put the question a little differently. The way that you have translated it there means “paha,” does it not? That is, there is that doubt or uncertainty of her having children. That is expressed in your translation?

A. Yes, it does.

Q. The equivalent is “perhaps”?

A. “Perhaps.”

Q. While the word “paha” is not there, you have the meaning? A. I have.

Q. Do you render it that way, “or in case she has children,” rather than to make it a condition? That is, this way here? Do you say it in the alternative there rather than to say but in case she should have children”? Why do you render it the way that you have instead of this other way?

A. I don’t know what my ideas were at the time. It struck me as being a correct translation.

Q. That is, your translation as you see, hear it now, appears to you to be what the testator meant in the use of these words? Is that right? A. Yes.

Mr. WILDRE.—Which translation are you talking about, the original translation you furnished or the amended translation?

A. This is the original. [277—220]

Q. Please turn to the amended translation, on the

(Testimony of C. L. Hopkins.)

first page there, that you afterwards filed.

A. "They alone shall have the care until she becomes a woman grown, or in case she has children they shall be executor during the lifetime of my daughter and to her children thereafter."

Q. And which translation is it that you think is correct? A. Well, of course, this is more full.

Q. That is the amended translation?

A. The amended translation because I have got the word *paha*.

Q. In your opinion, you have given effect in your amended translation to the word *paha*?

A. To the word *paha*.

Q. In connection with the balance of the clause?

A. Yes. When this was given to me it was said that there is a discrepancy somewheres. Of course, in translating it, I didn't see where the discrepancy was. Afterwards it was pointed out to me. I saw the two sentences which made the discrepancy. Then looking it over carefully, it was a matter of having left out the word *paha*. In the original translation, "or begets children."

Q. So by inserting the word, "or in case"— So your final opinion is that your amended translation is the correct one?

A. Well, it would be the correct one using all the words as in the Hawaiian which says, "a hanau paha kana mau keiki." That's the clause.

Q. So, as I understand you, you have given full effect to that word *paha* in the amended translation?

A. In the amended translation.

(Testimony of C. L. Hopkins.)

Redirect.

Mr. MAGOON.—But still you have in your amended translation the idea of the alternative there. The word “or.” A. Or. [278—221]

Q. You don’t put “but,” but you put it in the alternative, “Until she becomes of age or has children”? Means the same thing?

A. At the time when I was translating, but to give more effect I put the word *paha* and after, “but in case.”

Q. But in giving your translation you give your ideas of what the thing really conveyed?

A. What I understood.

Q. The amended translation made it scientifically correct?

A. I don’t know. As I say, I omitted the word *paha*, though it carries it in the sense in the translation and used the word *paha* by inserting “or in case.”

Q. The word *paha* means “perhaps”?

A. Well, “if,” “perhaps,” “in case,” “in the event of.” They are all *paha*.

The COURT.—Mr. Hopkins, how about the discrepancy. How is the discrepancy that was called to your attention effected by this amended translation?

A. As I understand it seems to have done *way* with the discrepancy by the insertion of the word “in case,” the words, “in case,” or “perhaps.”

Mr. MAGOON.—What— But you haven’t inserted the words “in case,” have you, in the amended

(Testimony of C. L. Hopkins.)

translation?

A. "Or in case."

Q. "Or in case." Do you use that word there, do you use those words as a condition or as an alternative?

A. I use those words here on account of the word *paha* appearing here. That's the reason I used the word. That is, to give effect to the word.

Q. Wouldn't it be more correct to say, "Until she comes to maturity or has children, if any." *Paha*. "A hanau paha ka na mau keiki." Until she becomes of age or has children, if any, isn't that the real, literal translation?

A. That may be one translation, or you can say, "or in case [279—222] she has children."

Q. "Or in case she has children?"

A. "Or in case."

Q. But the alternative is still there whichever way you put it, and not a condition.

A. I don't know what you mean by "condition."

Q. I'll ask you, If you wanted to make it a condition that she should have children wouldn't you use the clause "a ina e hanau paha kana mau keiki alaila"?

A. If you put it in that sense you would.

Q. Can you have a condition in the Hawaiian language unless you do use an expression of that sort?

A. No.

Mr. WILDER.—Unless you give it a translation which implies a condition, isn't there a repugnancy or inconsistency on account of the following sentence?

(Testimony of C. L. Hopkins.)

A. It would not if the word *alaila* were put in in order to make it a condition.

Q. The way it stands there, there is still a repugnancy or inconsistency?

A. Not as I see it now, because, as I said, in my first translation I ignored the word *paha*, but still use these words, "or begets children," conveying the same idea when the use of the word *paha*, but in the amended translation I use the word "in case," that is using the word *paha* and inserting there the English translation of "in case she has children."

Q. So that, to your mind, it means the same as if it said, "but in case she has children"?

A. Yes.

Q. And that is the sense you used it in the amended translation?

A. Just the same.

Q. Then, *what* don't you use the word "but"?

A. I took the word "but."

Q. But you have used the word "or" in the amended translation? [280—223]

A. Yes.

Q. Do I understand you can strike out that word "or"? It is absolutely essential, is it not?

A. That means the alternative.

Q. That's what I say, you can't strike it out?

A. As I understand it.

Q. Well, does it mean "but"? As I understand you in the amended translation, "but in case she has children."

A. I think in the translation of the word "e" it is sometimes used as "but"; it is sometimes used as "or"; just as the translator himself would be

(Testimony of C. L. Hopkins.)

guided by the sense of what he is translating. I take this sense to use the word "e" as "or."

Q. And if you used that word as meaning "but," in order to remove any inconsistency, what would be a proper translation?

A. Well, to tell you the truth, before I was not trying to get that inconsistency from the section that I used the word "or." Whether I used it rightly or wrongly, I don't know, but I have a thought in mind "or."

Q. If it was necessary in order to do away with the inconsistency would the word "or" there be translated as "but"? Would that be a proper translation?

Mr. MAGOON.—That's two elements, "or" and put in "but" in the place of "or."

Mr. WILDER.—Yes.

WITNESS.—If the word "but" is used, there should be some word in the act to convey that it is as "but"—of future occurrence, "but if she should have children."

Q. What I am trying to get at is this, if, in order to remove an inconsistency, would that word be translated as "but"?

Mr. MAGOON.—You mean independently of this will? [281—224]

Mr. WILDER.—No, in this will.

Mr. MAGOON.—I think that is rather an unfair question.

COURT.—Well, let the question go. Answer it if you can.

(Testimony of C. L. Hopkins.)

WITNESS.—I don't see how I can.

Q. Mr. Hopkins, "a" has a dozen different meanings? A. Yes.

Q. It means "a," sometimes "how," "or," "it." How do you say it is there?

A. "In case she should have children."

Q. Yes. Would that remove the discrepancy?

A. The word "e" would change the meaning of the translation.

Q. With "e" the discrepancy would be removed, would it?

Q. Is there any indication of any break or is it one continuous sentence?

A. It is one sentence up to "keiki."

Q. But up to that point, is the meaning in Hawaiian one continuous thought, one continuous sentence, or would you break that up and make it into two sentences ending with the word "a hanau." Is that one continuous thought until you come to the word "paha," and one continuous sentence, or should you break it up into two sentences, the last sentence beginning, "a hanau"?

A. I think it is more continuous, that it is the other way.

Q. That is, reading it in Hawaiian, you think it is one continuous sentence down to the word *paha*?

A. Down to the word *keiki*.

[Testimony of W. R. Castle, for John Ii Estate.]

Direct examination of W. R. CASTLE, a witness called for John Ii Estate, and sworn.

Mr. MAGOON.—Mr. Castle, I show you a trans-

(Testimony of W. R. Castle.)

lation of John Li's will. Is that your translation?

A. I should say it is; looks like the one I made.

Q. It is?

A. Yes, yes. It— The writing [282—225] is my own handwriting.

Q. I ask you with reference to the disputed words, *a kuanu kana mau keiki*, which you have rendered, "or until she bears children." What reason have you for giving that rendition of it rather than making it a condition, "but in case she has children?"

A. I read the thing— I read this clause in the will over a good many times before I made that translation, and it seemed to me finally that it was probably the meaning or the intention of it, although it involves a contradiction shortly afterwards. That is, I took it to be my duty to translate as I found it.

Q. If the testator had intended to created a condition there, what words would he have used in the Hawaiian?

A. That is, you mean a condition limiting their stewardship?

Q. No, a condition that the property should go to the children. If he had given it to the children and said, "But in case she should have children the" certain results would follow. But in case— This meaning, "But in case she shall have children, then they shall be the executors of my daughter and her children?"

A. Well, if I had been drawing a will like this myself for another, I think I should have said, *a ka*

(Testimony of W. R. Castle.)

ina e hana waua kana mau keiki alaila a lauwa no." That would be, then, "They shall remain trustees during the life of my children and her children after her.

Q. You were one of the judges, substitute judges, in the Supreme Court that construed this will?

A. I was.

Mr. WILDER.—Just a moment. I object to this question.

Mr. MAGOON.—I withdraw the question.

Q. If, Mr. Castle, there had been a condition created [283—226] there, such as has been suggested by me, would there be any difference in the structure of the sentence?

A. I remember in going over this will a few years ago, it struck me that the punctuation was pretty poor all the way through, but it would be expressed better to drop out the comma after the word *ai*. Leave out the comma and say a *hanau*.

The COURT.—But there being a comma there, Mr. Castle?

A. There being a comma there it indicates a pause in the thought, but the whole thing is so poorly punctuated you can't tell very much about that. I know that in making a translation the punctuation was poor all the way through. In fact, I never thought Mr. Kamockueheehu was quite adequate in will drawing.

Q. Does that whole clause there show all the words, *me lauwa wele no*, down to the— Withdraw that. Beginning with the words, *o lauwa no*— Be-

(Testimony of W. R. Castle.)

ginning with the words, *me laua wele no ka malama*, down to the words, *keiki*, express one continuous thought in the Hawaiian?

A. *Me laua wele no ka malama a hiki i kona wa e kanka makua ai, a hanau paha kua mau keiki.* It expresses in one sense a continuous thought. That is, there are two suppositions, two *thought* there.

Q. Yes. Are those two, is that thought one thought and expressed in there, or is it made a condition, that is: "until she becomes of age or has children"?

A. If it stopped at the word *keiki*, "they shall be the trustees until she arrives at the age of maturity or until she has children," that would stop off right. It goes on and says, *o laua no*. It goes right on to say that and then says, "They shall be the executors of my daughter and of her children after her, in accordance with the desires, my desires, expressed in this paper, in this instrument." You say if it stopped after the word *keiki*, then it might be disjunctive. [284—227] That is to say, "They shall be the trustees until she reaches the age of maturity or until she has children," but from what it says afterwards it indicates there is a condition to it.

Q. But still that would not make a difference. Your translation would remain the same?

A. Yes.

Q. You are familiar with the Hawaiian language, are you not?

A. Yes. Not so much as Mr. Parker, Mr.—

Q. You were born in Hawaii?

(Testimony of W. R. Castle.)

A. I was born here. I have talked it a great deal and have been interested in its study.

Cross-examination.

Mr. WILDER.—Mr. Castle, is there any way to translate that phrase to remove an apparent inconsistency the way you have translated it?

A. That is, beginning with *me laua uele no*?

Q. More particularly beginning with *a hanau*. To put it more plainly there, "or" or "but" or "and in case she has children, those two shall be the executors," and so forth?

A. Well, you see, Mr. Wilder, Judge Wilder, where it follows here and says, *o laua no*, seems to rather negative the idea that their guardianship or trusteeship will terminate with the birth of children.

Q. Seems to negative the idea?

A. Seems to rather negative it. *A i kanaka mau keiki aku*, "and of her children after her."

Q. That is, do I understand you, that it may be properly translated so as to remove the condition that if or but or and or or if she has children, those two shall be the executors?

A. Yes, that's quite possible. Probable rendition.

Q. And if that's the only way in order to remove the condition or inconsistency, it is probably the intention, isn't it?

A. Well, it looks as though the intention were they were to [285—228] be the trustees until she arrive at maturity, years of maturity, or become a parent, and, putting "and" instead of "but" or "or," "and

(Testimony of W. R. Castle.)

shall have her children, they two shall be the trustees during the time of the life of my daughter and or again, her children after her, in accordance with my desire hereinbefore expressed in this paper.

The COURT.—Not “hereinbefore expressed”?

A. No. In accordance with my desire expressed in this paper.

Q. In your translation as you have *give* it, in your written translation, have you given full force to the word *paha* in connection with the preceeding and subsequent clause?

A. “They two shall have—” “or until she bears children.” I see that my stenographer here has made a period here, although there is not a period in the other. I don’t believe I would vary that except because of the fact that it looks as though some discrepancy, it seems that the discrepancy has got to be passed upon by a court.

Q. What do you translate the word *paha* there as? “Until”?

A. *A hanau paha.* Or until she shall have children, or, shall have children.

Mr. MAGOON.—Mr. Castle, if you should have the word,—make it a condition, “but in case she shall have children,” they shall have the executorship during the life of my daughter, would not that create a greater inconsistency because the intention was this, “They should be executors during the lifetime of my daughter, or if she have children then they should be the executors until she becomes of age.”

(Testimony of W. R. Castle.)

A. Well, you can't get over the wording here, although, of course, that may refer to her not having children.

Q. The intention of the testator, would it not be served irrespective of whether she had children?

A. That is what it looks like. [286—229]

Q. If you should make it a condition?

A. *I kona ai*. That is, if it means until she reaches legal majority.

Q. Reading it, putting that as an alternative, having children and becoming of age, being an alternative, he continues, "to the executors during the lifetime of the daughter and her children," now, if you make it a condition that it goes—make it a condition "in case she has children, the executorship would not continue during the lifetime of the daughter?"

A. If the language stopped at the word *keiki*, that they were to remain the trustees until she arrived at years of maturity or until she gave birth to children it goes on and says *o laua* that, you see, is apparently inconsistent with the idea that their trusteeship is to cease with the birth of children. It goes on and says, "They shall remain executors during her lifetime, and apparently for her children after her."

Mr. WILDER.—There is only one question I didn't put. In making a proper translation, you take into consideration the fact that there may be inconsistencies?

(Testimony of W. R. Castle.)

A. Yes, unless I am asked to make a strict translation.

Q. What were you? I understand that you were translating a part only.

A. I was trying to translate verbatim.

Q. Without regard to the whole will?

A. For instance, I left out words that would supply in the English language, and those I left out purposely so as not to have it appear that there was an interpolation of words there.

Mr. MAGOON.—Do I understand, Mr. Castle, that you disregarded what you saw was the intention of the testator?

A. No. So far as possible I made the translation full, verbatim. In this particular place I didn't try to harmonize. [287—230]

The COURT.—Didn't you try to harmonize it by *find* out what the meaning of those words—

A. Well, in order to harmonize it. Not to the extent of interpolating words or sentences or thought of my own. As you will see, it says, "They two shall have the care of until she bears children." Care of what?

Q. Didn't you make a special attempt to translate the sentence so as to harmonize?

A. Yes, I tried to make that go in accordance with the apparent intention so far as I could make it harmonize by using the exact words of the will.

[Testimony of N. B. Emerson, for John Ii Estate.]

Direct examination of N. B. EMERSON, a witness called on behalf of John Ii Estate, sworn.

Mr. MAGOON.—Your name is Dr. N. B. Emerson? A. Yes.

Q. I had you a translation of the will of John Ii.

A. This is a paper received by myself in regard to an interpretation of a portion of the will.

Q. The translation which appears on page two of the document is made by you?

A. Yes, it was.

Q. Calling your *intention* to just those words in the will beginning with the words, *me laua wele no*, down to the words *mau keiki*, you have translated as what?

A. I shall have to prepare in order to be sure of my answer. “On these two alone shall devolve this care until she shall attain majority.”

Q. You have translated that “and perhaps,” a *hanau paha*, as “and perhaps *born* children.” What reason have you, Doctor, for that rendition and not putting it in the—making a condition of it, “or in case she should have children”? [288—230A]

A. It seemed the most direct and simple approach to the evident Hawaiian meaning as it struck me then.

Q. Have you had any reason to change that? Have you—does there appear to be any reason?

A. Hawaiian sentences—I have to make a little extended remark. I haven’t any reason to change that Hawaiian sentence which Mr. Magoon read.

(Testimony of N. B. Emerson.)

Hawaiian language has always a number of ways of expressing what we might express in one thought by words in the English language. There is a number of ways in which they look at a sentence. They are elastic in that respect. That is, their language is elastic, is pliant. We would have a different way. In turning an Hawaiian sentence into English we might find more than one way of expressing that same idea for different purposes. The whole force or a large part of the force comes on the force of the word *paha*. As I speaking to the point?

Q. I wish you would go on.

A. The word *paha* comes *ver* near to our word "perhaps." But the word *paha*, as I should say, seems to me to have a broader meaning than our simple word "perhaps." It sometimes even goes, you might say, almost includes the word "probable" or "probably"—the idea of probability.

Q. And you render it "perhaps" more literally this way, more to the meaning, *a hanau paha kana mau keiki*, "or has children, if any," the word *paha* being equivalent to "if any."

A. The way the sentence impressed me—I speak of it as sentence—that would not be alien to the idea. I think that would be a true—I think that would approach closely to the meaning of the author—of the writer, and yet I don't know whether I should change my meaning. I would not like to change it because it faces the apparent meaning more clearly.

[289—231]

Q. I see you have rendered that word "e" "if."

(Testimony of N. B. Emerson.)

And why do you give that construction rather than the word "or"?

A. May I see the Hawaiian? You mean *a* instead of *e*. You were speaking of the English?

Q. Yes.

A. Because I think the word *a* is more correctly rendered if.

The COURT.—In that connection?

A. What is that?

Q. In that connection?

A. In this connection.

Mr. MAGOON.—The sentence as you have constructed it or have translated it, is in the subjunctive, is it not; makes it "or" in case she has children," or, "and in case she shall have children after her"?

The COURT.—In case she shall have children.

A. Whether in the Hawaiian that *paha* makes it the subjunctive or not? It is conditional whether we call it subjunctive or not. I should say that would be equivalent to the word *subjunctive*. I wouldn't quarrel with the word *subjunctive*. I look upon the Hawaiian language as a — language in power and so you are merely keeping up, as it were, an academic standard. We are not looking at the Hawaiian language as it deserves to be looked at, with its own eyes and I think that the use of the word *subjunctive* has no meaning; doesn't belong to it.

Q. Is that one continuous thought or not? "Until she shall come to maturity or has children."

Mr. WILDER.—He has not translated it that way.

Mr. MAGOON.—And has children." Is that one

(Testimony of N. B. Emerson.)

continuous thought or is it, in the Hawaiian, two sentences? Can it be read as an alternative to that, "but in case she shall have children"?

A. Now, I've got your meaning. I see now what you mean. I think it is one sentence. I don't think it introduces a new adverse condition. [290—232]

Q. You, Doctor, have made a special study of the Hawaiian language?

A. I have been trying to for a good many years.

Q. You have translated recently, certain *mele's* of the Hawaiian language?

A. I have made into a book in English gathered from the hula.

Q. A translation of those *mele's* requires a perfect understanding of the language to render them correctly? A. It does.

Q. It is most difficult of all to translate?

A. It is very difficult. It is difficult both on its English side and its Hawaiian side.

Cross-examination.

Mr. WILDER.—In this clause is it possible to translate the word *paha* as "in the event of," or, "in case of"?

A. You ask if that would be possible?

Q. Yes. A. I think that it would.

Q. And particularly so if you would harmonize the otherwise inconsistency?

A. If I catch your meaning—

Q. That is to say, that if, in order to avoid an inconsistency in the English in the whole meaning of the English translation after it was made, it would

(Testimony of N. B. Emerson.)

be, that would be, the inconsistency would be *avoid* by saying "in case of," or, "in the event of"?

A. I think it would.

Q. And in making your translation, did you attempt to harmonize all those sentences?

A. I didn't make any effort to stamp any theory of mine or anybody else. I took that which was evidently the meaning and when I got thorough I thought, and I still think, that there was a perfect, that the will was consistent in itself. I didn't see any part of the will which pulled against the other parts. And so—I don't want to go beyond— [291—233] As he went on he added a definite clause.

Q. That's the clause starting in about bearing children?

A. Yes. This was merely a further conditioning clause without being at all, it seemed to me, inconsistent or adverse or opposite to the previous condition.

Q. That is, you mean a conditioning clause in this sense, that if she should have children then so and so, which, the way you have translated it, would be perfectly consistent with the previous—what had gone before? A. That's what it seemed to me.

The COURT.—Doctor, I don't quite understand that last. Do you not see an inconsistency in the sentence, "On these two alone shall devolve this care until she shall have attained majority and, perhaps, *born* children, and they shall be executors during the life of my daughter?"

A. Do I see a discrepancy?

(Testimony of N. B. Emerson.)

Q. Discrepancy or inconsistency between the fact that they should hold the receipts of all her lands until she is of age and that they should be their executors or trustees during her lifetime?

A. That is one thing and the other is an additional thing. I think it was an afterthought of his. As he wrote along he thought it would be a better—it just came to his mind and he put it in.

Q. But you see a discrepancy in those two things, don't you? That they shall have charge until she becomes of age and that they shall have charge until she dies?

A. It is just such a discrepancy as an Hawaiian is likely to make. It is more of a discrepancy when you put it into English than in the Hawaiian way of stating it.

Q. Would it have made any difference in your mind if there had been a comma after the word "majority," as you've got it in English? A comma after *kauka maua ai*. If there had [292—234] been a comma after that and also a comma after *keiki*. In your translation there is no comma after *kana mau keiki*.

A. I am not responsible whether it is there or not because I didn't copy it myself.

Q. You have put a semicolon there. Would that make any difference?

A. I don't think it would because the Hawaiians are very weak on punctuation. I don't think they look on punctuation the same as I do. I find very few people who are absolutely consistent in there

(Testimony of N. B. Emerson.)

punctuation. I think the Hawaiians are inconsistent. I find that manuscripts and old records and writings of the old class of people, and even of the younger, are very poor in punctuation. I find it only an incidental guide.

Q. You said the Hawaiians expressed one idea in many ways. Isn't it true that their expressions are quite indefinite? The word *paha* has a broad field. Haven't many words a broad field?

A. Many of their words are generic. That is especially in the philosophical, and such a word as *paha*—that word is not philosophical word, that's an adverb of time and condition or manner and so on. Am I answering your question? I think in some respects they are very special, they specialize more greatly, such as tying knots, cutting and breaking sticks. Then again in other words they generalize and we specialize. They have one word for right, good, and honest. That is, one generic word, one prominent one, whereas we have a very great many. So the word *paha* covers a very extensive range of meaning.

Mr. WILDER.—In regard to this matter of punctuation, would it make any difference to your mind, in regards to the force of it, that as a matter of fact this will was drawn by a lawyer?

A. It would make some difference who the lawyer was. [293—235]

Q. Supposing D. B. Mahoe?

A. Mahoe of Waialua. I do not think I was particularly well acquainted with him. I don't know

(Testimony of N. B. Emerson.)

about their powers and their standard of refined Hawaiian. It would not make much difference with me.

Mr. MAGOON.—Might I ask, John Ii was considered to be an exceptionally well educated and well-bred Hawaiian?

A. I think he was. He certainly was highly cultivated in Hawaiian lore and in Hawaiian thought.

Q. And do you believe that a person who did understand the Hawaiian such as he must have done, could have left out the words *ina and alaila*, words of condition?

A. I don't think he would have left them out.

Q. You don't think, being such an Hawaiian scholar, he would have stuck things in inconsistent?

A. I don't think he would. I don't find it inconsistent.

[Testimony of Henry Smith, for John Ii Estate.]

Direct examination of HENRY SMITH, a witness called for John Ii Estate. (Oath waived.)

Q. What is your name?

A. My name is Henry Smith.

Q. What is your age?

A. Fifty-five years old, and this paper, this is my translation of the portion of the will in question.

Q. Are you an Hawaiian?

A. I am an Hawaiian born, citizen of the United States, and am now holding the position of Clerk of the Judiciary Department, having held that position ever since the year 1893 under the reorganizing of the Judiciary Department of which the Judge was

(Testimony of Henry Smith.)

father of the law.

Q. Why do you translate the words *a hanau paha kana mau* [294—236] *keiki* as an alternative rather than a condition?

A. That's Parker's. This is mine. Well, I do so, your Honor, because it was one continuous clause without any full stop in there to fix a condition. It struck me that there should have been a period or a new clause to make a condition. In his copy was there a comma after the word *makua ai*?

Mr. MAGOON.—Comma, yes.

WITNESS.—*Makua ai* seems to me an equivalent and when she would come of age, it being he was probably not aware of the exact age when the children comes of age, over eighteen and twenty years, eighteen for female and twenty for male, which he adds, *a hanau paha kana mau keiki*. When she bears children she becomes of age.

Q. Was there any break in the thought?

A. I don't believe there was any break in his thought.

Q. Is there any indication that he intended to make a new sentence beginning with the words *a hanau*?

A. I don't believe that he intended to make a new sentence because of the fact that all of his gifts are enumerated in the will. It is in here, three, four, and five. If he wanted to change the sense of any of those enumerated gifts, he should have added them in the enumeration or maybe a complete new sentence which he failed to do.

(Testimony of Henry Smith.)

Mr. WILDER.—I want to ask him thise: Do you know that your translation makes an inconsistency or contracidtion?

A. I do not. I thought it was consistent enough, Judge.

Q. If so, would it make any difference, referring to the last question, in your translation?

A. If there is an inconsistency.

Q. If so, would it make any difference in your translation?

A. That's so. The fact of a supposed inconsistency—certainly, if there is an inconsistency it would alter the meaning of the translation. [295—237]

Q. In your translation where do you get the semicolon after the word "children"?

A. Nowheres. I put it in.

Q. Judge Dole asks you this question: Are not these translations inconsistencies? "They two alone shall have the sole care of it until she becomes of age, that is the first. They two shall be the executors during the lifetime of my daughter.

A. Well, these translations are inconsistent, but I was going on the theory, but they do not want to be inconsistent.

The COURT.—Now ask him to translate the words *a hanau paha kana mau keiki* to come right between these two clauses so as to make them harmonize.

Mr. WILDER.—Translate the words *A hanau paha kana mau keiki* between these two clauses so as to make them harmonize.

A. Or have given birth to children," I think is the

(Testimony of Henry Smith.)

translation I made. So as to make them harmonize with what clauses, please? The trouble is, Judge, he was harmonizing them all right at the time he was drawing that document when she was an infant, of two months or three months old. Now, we are considering the time when the language does not apply. He was looking at the child beside him when he wrote that language.

Mr. WILDER.—I'd like to add in there the meaning of John Ii when he executed it at that time. We want the meaning of the will at the time of its execution.

A. They two alone shall have the sole care of it—the property—until she becomes of age. He was continuing the trust. It may be a *repetition*. The second clause may be a *repetition* of that with this proviso, “During the lifetime of my daughter or until she gives birth to children.

The COURT.—I want to know, are the words capable of this translation: And in the event of her having children, which [296—238] would harmonize the antagonistic sentence?

A. They are capable of such translation and therefore my criticism of Mr. Parker's translation. I think they are capable of being made to harmonize.

[Testimony of O. H. Gulick, for John Ii Estate.]

Direct examination of O. H. GULICK, a witness called for John Ii Estate, and sworn.

Mr. MAGOON.—Mr. Gulick, I hand you, Mr. Gulick, document which is signed by you and it gives a translation that is, the Hawaiian words of the John

(Testimony of O. H. Gulick.)

Ii will beginning with the words *me laua wale no*, which you have rendered, "The sole keeping until she shall become of age or until she may bear children," What reason do you have for giving that version of it rather than making it a condition upon which a new gift was to take place for instance, make it to mean, "They shall have charge of it until my daughter becomes of age and when she becomes of age then I make a new disposition of it.

A. Paha I took to be expressed by the idea of may be or alternative, or it may be simply continuous or until she may bear children, until such time as she may bear children. They are the executors during the life of my daughter, during the life of her children.

Q. And in that case, according to your rendition, "or until she bear children would be the same as "until she becomes of age. There are two conditions there. One is her becoming of age and the other is her having children? A. Yes.

Q. If he had intended to create a new gift, a gift over, putting it as we would, "but in case my daughter should have children then I give the income in a certain way," what words would the testator have used, "But in case my daughter should have children"? [297—239]

A. *A ina paha*, "of if she should have children."

Q. From your knowledge of Hawaiian, would any intelligent Hawaiian express that condition in the way that the language of the present will would? That *a ina paha*, would any intelligent Hawaiian dis-

(Testimony of O. H. Gulick.)

regard this phrase, a *ina paha*, or words to that effect and express this same condition?

A. A *ina paha*, would signify or in case she shall have children.

Q. The words in the will do not express that condition, do they?

A. I don't think so. My impression of the *paha* is merely, "if she shall have children," making it an alternative rather than a new gift over.

Q. What familiarity have you had, Mr. Gulick, with the Hawaiian language?

A. I have the hearing of it for about eight years. Mr. WILDER.—I admit he is qualified.

Mr. MAGOON.—And in your study of this will, have you tried to give the meaning of the testator with reference to the use of those words or have you simply taken the words irrespective of trying to get his meaning?

A. I stopped to get his meaning.

Cross-examination.

Mr. WILDER.—If in order to harmonize your translation—in order to harmonize your translation, is it possible to translate the word *paha* as meaning in the case of?

A. I think it is possible. The Hawaiian language is indefinite in the use of a great many words. There is an indefiniteness and a vagueness to Hawaiian expressions.

Q. After this clause in reference to having children, the statement that they shall be executors has reference to what event from this will?

(Testimony of O. H. Gulick.)

A. Once more, please. [298—240]

Q. The statement here that they shall be the executors during the lifetime of my daughter and her children, has reference to what in your opinion, your translation having previously said that they shall be executors until she—that is, his daughter—reaches maturity.

The COURT.—I don't suppose that he would understand your question.

A. The sentence is pretty plain there. The executors during the life of my daughter and of her children. It looks in one view of it as though they were continuous executors even after the children were born.

The COURT.—I think he wishes to know what that sentence which refers to, refers back to in the previous words. Whether it refers back to the sentence where they shall hold until she is of age or to the next sentence which says in case she shall have children. Isn't that it?

Mr. WILDER.—That's the idea. The idea I think is whether the sentence which refers to her having children isn't the one which gives life to the following sentence.

A. Certainly, it seems to me.

The COURT.—For instance, I'll state it again, Whether the succeeding sentence which refers to their continuing during her lifetime derives its power from the previous sentence giving them control through her minority or the next sentence refers to the probable or possible birth of children. It re-

(Testimony of O. H. Gulick.)

ceives its value from which of those two contingencies.

A. That last sentence receives its value from the contingency supposed that she should have children.

Redirect.

Mr. MAGOON.—That is, Mr. Gulick, if she had no children the executors would not continue during her lifetime supposing she had no children?

A. To continue during the life of my daughter and of her [299—241] children.

The COURT.—But supposing she has no children, when is it her control ceases?

A. The end of her life.

Q. Then what becomes of the sentence above, during her minority?

A. This is an inconsistent document, that's what I think about it. There is an inconsistency there which the translation can't remedy. Has no business to.

Q. This question that I asked Smith, I would like to ask the same of you. Are the words, a hanau paha kana mau keiki, capable of this translation: and in the event of her having children," which would harmonize the antagonistic sentences. I will state it this way, ma laua wale no ka malama a hiki i kona wa e kanaka makua ai, a hanau paha kana mau keiki, o laua no hooko kauoha ika wa e ola ana kuu kaikamahine. There is the repugnancy. Now, if we translate the middle sentence "and in the event of her having children or giving birth to chil-

(Testimony of O. H. Gulick.)

dren, which removes the repugnancy so that the sentence would read in this way, "They two to have charge until she reaches majority, and in the event of her giving birth to children, they two to have charge during her lifetime, the lifetime of my daughter.

A. Your question is whether that translation can be admissable.

Q. Yes.

A. I don't think that the writer had it very clearly in his own mind. I think the writer's mind or the composer of the will was vague.

Q. Yes, but can you gather from those words what you mean?

Mr. MAGOON.—We haven't had an answer to your question.

A. I don't think this is *a* admissible translation.

The COURT.—Are the words capable of it considering the discrepency?

A. I don't think that can be. There may be necessities which [300—242] compel, of course, which were not thought of by the writer, but whether it would be consistent with the will or not—

Q. According to legal rules we must interpret the will or any instrument from the words of the instrument, but it must harmonize with the words. It certainly must not be inconsistent with the words. Would you say that such a translation would be what those words are capable of, considering the Hawaiian use of language and considering the discrepency.

A. Would it be admissible to construe it to mean

(Testimony of O. H. Gulick.)

that they were to be the executors only until she was of age.

Q. No. The point was this: supposing she had no children, it is perfectly clear they are executors until she becomes of age, but in case of children, do the words carry on their authority and during life-time?

A. I am inclined to that view, that it did carry that authority. Whether he intended it or had that idea it is capable of doubt, but that was my thought in the translation. That they are executors as long as the children live during the life of daughter and of children.

Mr. MAGOON.—What I am trying to understand is not so much what the testator had in mind, but what the words have— Are those words capable, those words that you find there, of any such translation as they are placing upon it. Are the words there capable of this translation: and in the event of her having children, read in connection with the longer sentence, or are those words only capable of the translation, “and in the event of her having children.”

The COURT.—They two shall be the executors during the lifetime places the value on the other.

Mr. MAGOON.—Now then, taking that *a* a whole, is it possible to read this word, and in the event of her having children. Is it possible instead of the words,—if you should read this into the words what expression *would think* of instead?

A. A ina paha. [301—243]

(Testimony of O. H. Gulick.)

Q. Any other such as *alaila*?

A. *Alaila* would need to follow.

Q. From your knowledge, Mr. Gulick, of the Hawaiian could you ever imagine an educated Hawaiian to attach to the words that you find there this meaning; and in the event of her having children?

A. I don't think I should translate it that way. Paha in this case did I construe to mean alternative.

[Testimony of J. M. Poepoe, for John Ii Estate.]

Direct examination of J. M. POEPOE, a witness called on behalf of John Ii Estate, sworn.

Mr. MAGOON.—Mr. Poepoe, how old are you?

A. Fifty-eight last month.

Q. You were born in Hawaii, were you?

A. Yes.

Q. Are you a lawyer by profession?

A. Yes.

Q. And newspaper editor by occupation as well as lawyer? A. Yes.

Q. Calling your attention to these words, a hanau paha kana mau keiki, I want to know from you whether it is possible to attach this meaning to those words, a hanau paha, and in the event of her having children, instead of as you give it here?

A. A hanau paha kana mau keiki alone as it is written there is very doubtful whether it means the issue of her daughter, to give to other issues, a hanau paha kana mau keiki, whether children to bear *childre*. If the phrase or sentence stands right there,

(Testimony of J. M. Poepoe.)

but coming to the former phrase a hanau paha kana mau keiki, it would mean "or perhaps she bear children. "Now, e alone would be a connective conjunction without the particle paha, but if the particle paha follows e, it would change from a connective conjunction to a disjunctive conjunction. And so leave out paha it would read, it would then read "and" simply, and not or. And if she bear children, but with paha [302—244] in, or perhaps.

Q. Indicate if you wanted to make a condition, "but in case she have children," and then create a new gift or a new condition, what words in Hawaiian would you use instead of the words that are there?

A. *Ina*.

Q. Just go right along.

A. A *ina*, there is your connecting conjunction. A *ina* for hanau. That's the verb. A *ina* e—e, to, hanau kana mau keiki. Without paha it is not sufficient.

Q. Then what? A. That is a new event.

Q. What word must you use there in order to make it go from— A. A new condition?

Q. Must you use any word there to make it complete. Don't you use the word *alaila*?

A. Then coming on there you must have any connective word "to," "and."

Q. What word is that? A. *Alaila*.

Q. Could you imagine, Mr. Poepoe, any Hawaiian making this meaning, "but," of that will?

A. Please, your Honor, when this document came to me as I looked over and it is all in Hawaiian, and

(Testimony of J. M. Poepoe.)

then I look, John Ii there names, and D. B. Mahoe. D. B. Mahoe was a lawyer at the time and I don't know whether he drew the will or was a witness, but when I read that will over it is poorly constructed and coming that next clause that language is so difficult to make out, so the question would ask, a native as D. B. Mahoe who was a smart native and Ii who is Judge Ii, is an Hawaiian scholar he was one of best Hawaiian historian.

Q. Was he a writer? He wrote books, did he?

A. Yes. I was very much in doubt if Ii would ever put a word other than what he meant to do. I take it that he meant in the event of his having children—that's only stretching. [303—245]

The COURT.—Then, what comes next?

A. Stretching out the idea a person might say it meant in the event, but it is not exactly, "in the event," it is in the future uncertainty. The daughter may live two hundred years then there is that condition, "in the event," in the event of her bring a child after a hundred years. That is absurd upon the face of it.

Mr. MAGOON.—There is another question that Judge Weaver suggests to me. Supposing that she had had children and died leaving the children but died before maturity and died before maturity, what would be your idea as to that state of affairs under the wording of the will? Withdraw that.

Cross-examination.

Mr. WILDER.—Mr. Poepoe, the translation you've given us makes this clause inconsistent, there

(Testimony of J. M. Poepoe.)

is a repugnancy between the two. Now, then, if, in order to take away that inconsistency this phrase is translated "in the event of her giving birth to children," would that be a proper translation?

A. I cannot say concerning in the event of her giving birth to children. I would not take that as my construction, but I say "perhaps."

Q. But, in order to remove the inconsistency, may those words be translated in that way so as to make the will consistent? Do you know that your translation makes an inconsistency? A. Yes.

Q. Do you know what the inconsistency is?

A. Yes.

Q. What is it?

A. Of course, in this translation, the word she is left out, "Or perhaps she shall" ought to be there. "She shall give birth to any child."

Q. The inconsistency is this: He first says, "These two shall be executors until my daughter reaches majority." Then he says, "These two shall be executors during the lifetime of [304—246] my daughter." Now, don't you see that's inconsistent? This clause comes in between about giving birth to children.

A. There is where the difficulty of the construction of this will. Now, in reading, a good Hawaiian does this, "Me laua wale no ka malama a hiki i kona wa e kanaka maukua ai a hanau paha kana mau keiki," on sentence. Next there this commences a new sentence, "Olaua no na hooko kauoha i ka wa e ola ana kuu kaikamahine," is a new sentence that

(Testimony of J. M. Poepoe.)

does not follow the other.

The COURT.—It destroys the other, it kills the other. The other says until she was of age. This says until she dies. First they were to be the trustees until she was of age. Now they are to be trustees until she dies.

A. In the former there they are to be executors, the administrators and guardians in this last clause.

Q. Until she becomes of age. Now this last one, until she dies.

A. On this side a laua that comes after the other. They are the executors during the lifetime of his daughter.

The COURT.—Let me ask you to begin with the word a hanau and read right through this sentence as if that was one sentence. Supposing you read it so, made it sound as— Supposing you make a period after ka makua ai. Supposing you make a period there or semicolon can't you make that a sentence.

A. It is there that I think a good Hawaiian would make a period there and commence a new sentence.

Q. Now I want you to translate this sentence as if it began, a hanau paha kana mau keiki, o laua no na hooko kauoha i ka wa e ola ana kuu kaikamahine?

A. Then, I would make a new translation of that, "And they two are the executors during the lifetime of my daughter."

Q. Supposing you translate the whole sentence

(Testimony of J. M. Poepoe.)

that I read. [305—247]

A. And to her children.

Q. Supposing you try again and translate this: A hanau paha kana mau keiki, o laua no na hooko kauoha i ka wa e ola ana kuu kaikamahine.

A. It could not be that way. I would not accept that way. I don't even try it. The connective conjunction e is there "e hanau paha, without the word paha that connective conjunction e remains but has to be translated as a, but when the word paha comes in then it change that from a connective to a disjunctive.

The COURT.—Can't you read that last sentence, "O laua no na hooko," can't you read it along with the other without a period between. Supposing that is a disjunctive conjunction, supposing you read it this way, "Until she becomes of age"?

A. If I am going to read that I would say, a ina paha.

Q. But you don't think you could read it that way without putting some more words. As it stands you couldn't read it that way. That is, you couldn't read it in case of children, o laua ina. You couldn't read it that way.

A. That would be spreading that part of this sentence.

Q. You know D. B. Mahoe and Kahanu and all those men were Hawaiians of the last generation. You knew them when you was a small boy.

A. I attended law school under Kahanu.

Q. Don't you recognize that the Hawaiians at

(Testimony of J. M. Poepoe.)

that time used the Hawaiian language quite differently and used it less exactly didn't they?

A. Yes.

Q. I know the Hawaiians when they first began to be educated they found it hard to express themselves with a pen on paper. He speak to you and he talk beautiful Hawaiian to you. He write you a letter and you can hardly read it. Would not that somewhat account for this bill which is defective in many ways?

Mr. MAGOON.—Do I understand from your answers to Judge Dole that you thought the Hawaiians in former times were less [306—248] exact in their expressions than they are to-day?

A. In some cases.

The COURT.—I refer particularly to writing.

A. In writing, yes.

Mr. MAGOON.—Do you think that the Hawaiians like D. B. Mahoe and John Ii were less exact—Which would you take as better, the Hawaiian used in Judge Ii's and Mahoe's time?

A. That's the real Hawaiian.

Q. Perfect Hawaiian?

A. Perfect Hawaiian.

Q. And John Ii, who you say was an educated man, as well as Mahoe, who you say gave lectures—

A. Yes.

Q. Do you think they would be less exact or more exact?

A. In the way they used to write the Hawaiian

(Testimony of J. M. Poepoe.)

those days and talk the Hawaiian those days, more exact.

The COURT.—That is, the Hawaiian at the present time, that is corrupted Hawaiian.

Wednesday, August 3, 1910, 9:30 A. M.

[Testimony of H. H. Parker, for John Ii Estate.]

Direct examination of H. H. PARKER, a witness on behalf of John Ii Estate (Oath waived).

Mr. MAGOON.—Mr. Parker, I show you the original will of John Ii and call your attention to clause five and more especially to the words, these words, “a hiki kona wa e kanaka makua ai, a hanau paha kana mau keiki.” You have translated those words in the translation which has been furnished to Judge Dole, this way: During the lifetime of my daughter— Excuse me, I withdraw that. “Until she comes of age and in the event of her giving birth to children.” These words, “Until she comes of age and in the event of her giving birth to children.” Will you kindly give us the reason that you had for rendering those words in Hawaiian as I have read your English version?

A. That’s the meaning that I got from this section of the will, from this paragraph. [307—249]

Q. Can you explain how you got that meaning?

A. Very evident here. “Me laua wale no ka malama a hiki i kona wa e kanaka makua ai.” That is definite. “A hanau paha kana mau keiki.” In the event of having children. During the life of my daughter and her children following her. That’s the

(Testimony of H. H. Parker.)

only interpretation I got out of it.

Q. Do you give that this meaning: "If she has no children then they are not to be the executors or trustees during the lifetime of the daughter?"

A. I do not. I understand the meaning of this to be that they are the executors of the daughter and in the event of her having children the executors of her children.

Q. So it is entirely immaterial, according to your rendition whether she has children or not, they are still executors during the lifetime of the daughter?

A. That's how I understand it. Did I make any different interpretation than that?

Q. I might say that this is a very technical matter. Perhaps you would not understand. Do you understand that your own translation gives any different construction from what you have given here?

A. I do not understand that it gives any different construction.

Q. That is, that they are to be the executors or trustees during the lifetime of the daughter and then if the daughter has children then they are to be the executors or trustees of her children.

A. I understand it that way.

Q. Do you intend to, in your translation, make that a condition or make that a condition, "but in case she has children," or do you intend, in your translation, to give it the alternative?

A. I didn't intend anything in my translation excepting to make a meaning in the English language of

(Testimony of H. H. Parker.)

that phrase. I didn't know what the merits of the case was. My object was simply to [308—250] get at the meaning of that clause.

Q. Now, in case, Mr. Parker, that it should have this meaning, I would ask you to word it in Hawaiian as you think it should *to* be, "in the event of her having children, then a certain condition was to follow; making an entirely new disposition of the property or the income. I would ask you how would you make that condition? Wouldn't you use the words *ina* and *alaila*?

A. I don't know what word I should use.

Q. I would like to ask you to put in these words in the Hawaiian, or this meaning in Hawaiian, "They to have the sole care of it until she becomes of age, and in case she has children they shall have the sole care of it during the lifetime of the children,"—and in case she has children.

A. A ke hanau paha na keiki o laua na hooko kauoha i ka wa e ola ana kuu kaikamahine.

Q. Now let me ask you, would you not put in the word *alaila*?

A. I can't tell now. If I were making the will I could then tell.

Q. Wouldn't you use it this way, "A hanau paha kana mau keiki *alaila*," putting in the word *alaila*?

A. A ke hanau, did you say?

Q. If you should put in the words, "but in case she has children they shall be the executors and so forth. Now you've rendered that—wouldn't you put in the word, after *keiki*, the word *alaila* to make it

(Testimony of H. H. Parker.)

read a ke hanau paha kana mau keiki alaila?

A. I can't say whether I will or not. It might be put in. I don't know as it would alter the meaning of the phrase.

Q. But in any event, to make it read "But in case she should have children, you would have to change it?"

A. Ke hanau comprises that, covers that.

Q. Then you would change it from what it is in the original to what you have translated here to express the condition? You say you have made a change in there, Mr. Parker, to express a condition, "but in case she has children"? [309—251]

A. Yes. That's implied in the paha.

Q. But you have got a ke, you put in the word ke to express that condition?

A. Yes. I don't think the word ke is necessary there.

Q. If you were making that will in grammatical Hawaiian and were asked to say, to express that thought, "but in case my daughter should have children then I give the property in a certain way," would you not say *ina e hana paha kuu keikimahine*? Hanau kuu keikimahine alaila?

A. I might put that in, *ina*.

Q. Wouldn't that be the logical, grammatical way of expressing it?

A. That would be a way of expressing it. That would express the idea I think, of this paragraph.

Q. If you wanted to express the idea the same idea, "but in case she should have children before majority, how would you?

(Testimony of H. H. Parker.)

A. I should say, "Ina e hanau kana mau keiki mamua kaoo ana.

Q. Well, now, leaving out the idea of having children under age, but having children at any time, would not you express that thought in the *ver* same language, a ina e hanau oia kana mau keiki?

A. I might. I couldn't tell until I was going to write the will.

Q. Independent of being called to write the will, if you were called upon to put this expression into Hawaiian, "In case my daughter should have a child after *reach* majority, then I give and so forth?

A. Ina hanau keiki kau keikimahine mahope (first) kanaka makua o ku ana.

Q. I left out one element there so I repeat the question. If you want to express this idea, "In case my daughter should have children, perhaps before or after she reaches majority," giving special significance to the word "perhaps."

A. In case my daughter should have children?

The COURT.—The language don't mean anything Mr. Magoon. "Perhaps" [310—252] has no value in that sentence.

Mr. MAGOON.—Perhaps before or perhaps after, she shall become of age.

A. Ina e hanau o keikimahine paha mamaua. I don't quite understand your sentence.

Q. Then I'll leave out the word "perhaps."

A. A ke hanau keikimahine ma maua a i oli ia mahope paha o kono o ana.

(Testimony of H. H. Parker.)

Cross-examination.

Mr. WILDER.—I have no question.

Mr. MAGOON.—Excuse me. I would like to let Mr. Weaver ask his own question.

Mr. WEAVER.—How would you translate the expression, "The trustees will have," at the first part, "The trustees are to have the power and so forth, now, Until my daughter reaches maturity or has children, the idea being she might have children before *minority*, before she reaches majority. The idea is, "Until my daughter is of age or has children." How would you express that?

A. A hiki wa ke hanau ka keikimahine, I don't understand.

Q. Until she is of age or has children?

A. A hiki kono wa e owai a hana mua paha kona mau keiki.

Q. Now suppose. How would you translate the same expression slightly changed. "Until she becomes of age or bears children?"

A. A hiki kona wa e o ai a hanau paha na keiki.

Q. And how would you translate into Hawaiian, the expression, "Until she becomes of age or bears children, perhaps?"

A. A hiki kona wa a hanau paha na keiki.

The COURT.—Mr. Parker, when you was questioned in regard, I don't know as it is important here, but you were asked how you understand your English translation which is as follows, "With these two only is invested the care of my daughter," here but it really means of the receipts of rents, until she

(Testimony of H. H. Parker.)

becomes of age, [311—253] and in the event of her giving birth to children, the same two shall be the administrators during the lifetime of my daughter," and I understood you to say that that meant that in any case these two trustees were to be the trustees during her lifetime in case she had children, during the lifetime of the children. I want to call your attention to the first part of it, "Until she becomes of age, whether the meaning is not that they are to be the trustees until she becomes of age, but in the event of children then they are to be the trustees during her lifetime, extending it?

A. I understand that the meaning of that was that they were perpetual trustees of the daughter and the children in case she has children.

Q. Then what's the value of the words, "until she becomes of age?

A. In the event of her giving birth to children they two shall be the trustees of the children.

Q. But the words that they shall be trustees until she becomes of age supposing no children were born, would that, you think, carry on their trust?

A. That's the way I understand it.

Q. How does this look to you, that it means that they are to be the trustees until she became of age, but in case she had children they were to continue to be trustees during her lifetime. That they were to be trustees until she became of age in case there were no children, but in case of children they were to continue during her lifetime and her children?

A. During her lifetime.

(Testimony of H. H. Parker.)

Q. That is in case she has children, isn't that?

A. In case she has children they shall continue to be *trustees her* children after her.

Q. For lifetime?

A. During her lifetime. [312—254]

Q. Supposing there were no children?

A. They were merely trustees during her lifetime.

Q. Is that the way you look at it?

A. That's the way I look at it.

Q. What is the first clause, "until she becomes of age," what is the value of that then?

A. I don't know. I can't make any other interpretation of that.

Q. Mr. Parker, in regard to the Hawaiians—

A. In the first sentence, the first part of the sentence, it would seem that they were trustees during or until the daughter became of age and in the following clause as long as she lived.

Q. Isn't that on account of the contingency of children in the second part?

A. It may be so. I don't know what his meaning was.

Q. Well, Mr. Parker, the Hawaiians of the last generation, before writing words had become less of a novelty that it is now, did Hawaiians express themselves on paper with the care that they expressed themselves in conversation? Were they able to express themselves in good Hawaiian?

A. No, I don't think they conveyed their meaning as clearly.

Q. The Hawaiians of a generation ago expressed

(Testimony of H. H. Parker.)

themselves in writing clearly compared with the present Hawaiian. They were more correct—in better Hawaiian. The Hawaiian has become corrupted somewhat? A. Yes.

Q. What I mean is, were they able to express themselves in the same way in writing a letter the same as— A. In conversation?

Q. Yes. A. No. They were not.

Q. And the Hawaiian language as compared to the English language in definitiveness?

A. Very indefinite compared with the English. Rather a poetical language.

Mr. MAGOON.—I'll ask you one more question. Were you acquainted with Mr. D. B. Mahoe?

A. Yes. [313—255]

Q. He was an educated Hawaiian, was he not?

A. I think he was a graduate of Lahainaluna, I am not sure.

Q. From your acquaintance with him should you say that he would be able to express in Hawaiian that thought you have given here?

A. I think he would be able to express it.

Q. If he intended to say that he would be able to?

A. Yes.

Q. Also the same would apply to John Ii?

A. John Ii was an intelligent Hawaiian.

Q. Was he an author? A. I don't know.

Q. W. L. Moehonua, did you know him? Was he an educated Hawaiian? A. No.

Q. How about D. Kahanu?

A. I didn't have much acquaintance with Kahanu.

(Testimony of H. H. Parker.)

You mean the lawyer?

Q. Yes.

A. I wasn't very much acquainted with him.

Q. In the expression of a condition like, "but in case of, would an Hawaiian in those days, an educated Hawaiian in those *have* have any difficulty whatever?

A. No, I think he would be able to express it.

[Order Allowing Costs for Expert Witnesses Re Hearing, etc.]

The COURT.—I'll allow costs; I'll allow \$10.00 each to be charged as costs (for the expert witnesses).

Enter here that this hearing has been with the consent of counsel who were present throughout on both sides, the suggestion of further evidence on the will being made by the Court which did not consider itself bound by the agreed translation of the will on file.

MAGOON.—Will the translation of Mr. Rice and Mr. Gay be considered in evidence the same as the other?

The COURT.—If there is no objection.

WILDER.—No, I have no objection.

The COURT.—You would have no objection to having it (the Estate) [314—256] placed at over half a million; half a million or more.

WILDER.—I think not.

Mr. MAGOON.—That's about right.

[Reporter's Certificate to Transcript of Evidence.]

I hereby certify that the foregoing is a full, true, and faithful transcript of my shorthand notes in the above-entitled cause.

Honolulu, T. H., August 11, 1910.

/S/ O. P. SOARES,
Official Reporter. [315—257]

Exhibit No. 18.

*In the United States District Court for the Territory
of Hawaii.*

April, A. D. 1910, Term.

No. 47.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN II ESTATE, LIMITED, an Hawaiian Corporation, et al.,

Defendants.

Opinion of U. S. District Court.

September 1st, 1910.

Supreme Court, Territory of Hawaii—Construction of Laws—Federal Court of Hawaii: The federal court in Hawaii will follow the construction of the laws of the Territory made by its highest court.

Same—Same—Same: A suggestion of a probable construction of municipal law by the highest court of the Territory of Hawaii, not adopted

by the court making it, is not binding on the federal court of such Territory.

Jurisdiction of Supreme Court of the Territory of Hawaii over Reserved Questions from Judge:

The Supreme Court of Hawaii has no jurisdiction of questions reserved to it by a Circuit Judge sitting in equity at Chambers, and a decision of such questions by the Supreme Court is void.

Same—Decree: The decision of such reserved questions by the Supreme Court is without legal effect, unless it is made the basis of a decree by the judge reserving them.

Jurisdiction of Subject Matter—of the Person:

Jurisdiction of the subject matter cannot be conferred by consent or waiver, but jurisdiction of the person may.

Waiver by Minors: Minors may waive objection to errors apparent on the record that do not involve jurisdiction of the subject matter. [316—258]

Decree on Demurrer—Res Adjudicata: If a suit is dismissed on demurrer on the ground of defective pleadings or any ground which does not go to its merits, the decree or judgment will be no bar to another suit.

Same—Issue: Where a decree “refers to the opinion of the trial judge in terms that make it clear that the object was to refer to it to explain what was determined, and the reasons therefor, then such opinion becomes a part of the record, and must be looked to to explain what was in issue and what was determined by the decree in question.”

Same—Same—Opinion Affirming: The opinion of the court affirming such decree is inadmissible to show that the question determined was different from that in the record.

Minors as Parties—Representation—Jurisdiction: Where minors are alleged plaintiffs in a suit in equity and the bill is signed by their next friends, who also are parties plaintiff, with their own names only, and the names of counsel are typewritten, no jurisdiction is acquired over them; and such a bill is good only as the bill of such next friends.

Same—Representation of Hostile Interests by Same Counsel and Next Friends: Where minors and their mother were represented by the same counsel and next friends in proceedings that resulted in the consideration of an issue not intended to be raised by the bill, and yet probably within its scope, in which issue such minors and their mother had hostile interests, and which was decided in favor of the mother; *held*, that the minors were not represented in the trial of such issue and did not have their day in court.

Devise of Fee—Of Life Interest—Contingent Devise: Where the terms of a devise, with a devise over, contingent on the death of the first devisee without issue, show an intention that the first devisee shall take a fee upon the death of the testator, the contingency is the death of the first devisee, without issue, during the life of the testator, but, surviving the testator, he takes an absolute estate in fee simple, but where the terms

of the first devise are indefinite and not inconsistent with a construction by which only a life interest is given, it creates a life interest only, there being no obstacle to carry out the contingent devise.

Rule in Shelly's Case: The Rule in Shelly's Case will not be allowed to defeat the clear intention of a testator.

Rule of Property—Stare Decisis: There being no construction of statutes or findings establishing business methods, and no series of decisions settling any legal principle relating to property, no rule of property has been created and the rule of *Stare Decisis* cannot be said to apply. [317—259]

Estoppel: Estoppel will only apply against one where there has been some act by him which has induced a change of position of those who allege the estoppel, or their privies, in accordance with his real or apparent intention.

Estoppel Against Minors: Estoppel does not run strictly or at all against minors.

Translation—Discrepancy: A translation of a clause that removes a discrepancy is preferred to one that fails to do so, if it is reasonably within the bounds of grammatical and etymological interpretation.

Status of transactions entered into in good faith, under decisions in the first and second cases, considered.

Proceeding Under the Law of Eminent Domain.
Hearing for Distribution.

[318—260]

ROBERT W. BRECKONS, U. S. District Attorney,
for Plaintiff.

A. G. M. ROBERTSON (Withdrawn on January
31, 1910, on account of appointment as U. S.
District Judge), and Messrs. THOMPSON,
CLEMONS & WILDER, Attorneys for Claim-
ants.

Messrs. MAGOON & WEAVER, Attorneys for De-
fendant.

The Court having awarded the sum of ten thousand dollars to the defendants herein, as compensation for their claim and interest in the real property condemned and taken in these proceedings for the use of the plaintiff under the law of eminent domain, and such sum of ten thousand dollars having been deposited by the plaintiff in the registry of the court, subject to further proceedings for the determination of the respective claims of the defendants to the said fund, and notice accordingly having been served on the defendants or their counsel, the following claims were presented and tried before this court, to wit:

By the said John Ii Estate, Limited, one of the said defendants, ten thousand dollars, being the whole of the said fund;

By the said George Ii Brown, one of the said defendants, who has since the beginning of these proceedings arrived at the age of majority,—“a one-third share or interest in said fund, subject to the life interest therein of the said Irene Ii Holloway, or the

said John Ii Estate, Limited, as the assignee of her life interest," and

By the said Francis Hyde Ii Brown, a minor, one of the said defendants, by A. G. M. Robertson, his Guardian *ad litem*, "a one-third share or interest in said fund, subject to the life interest therein of the said Irene Ii Holloway, [319—261] or the said John Ii Estate, Limited, as the assignee of her life interest."

For convenience wherever used in this decision, the word Estate shall mean John Ii Estate, Limited; the word Irene,—Irene Ii Brown or Irene Ii Holloway, as the case may be; the word George,—George Ii Brown; the word Francis,—Francis Hyde Ii Brown, and the word children,—the surviving children of C. A. Brown and Irene Ii Brown, being the said George and Francis.

It appears that on April 7th, 1874, after the marriage of the said Irene with the said C. A. Brown, and the birth of her three children, two of whom are now surviving in the persons of George and Francis, A. F. Judd,—one of the executors of the last will of John Ii, deceased, the father of the said Irene, and one of her Guardians, after being discharged as such Guardian, brought a bill in equity before a Circuit Judge of the First Circuit, for himself and as next friend of the said Irene and her said surviving children, against the said C. A. Brown; and that thereafter, on August 10th of the same year, an amended bill was substituted therefor, with the same parties as plaintiffs and defendant, except that Sanford B. Dole, administrator with the will annexed and guar-

dian, was joined therein as an additional party plaintiff. Such amended bill alleged, among other things, an omission in the copy of the will furnished by the court to the said A. F. Judd, whereby the said executors and guardians not being fully advised of the true nature and intent of the said will, procured their discharge as guardians of the said Irene upon her marriage; but, that upon becoming acquainted with the complete will, believed that they were thereby constituted not only executors of the will and guardians of the said Irene, but also trustees with the right to the control [320—262] of her estate during her life; and that under and by said will provision was made for the children of said Irene and also for the support of said Irene, and it was important to obtain a construction of such provisions and the relative rights under said will of such minor children and the said Irene and the said C. A. Brown in and to the said estate, and to the income thereof, and the duties of the said trustees to the several beneficiaries aforesaid under said will, and prayed, among other things, "that the terms and provisions of said will and the duties and obligations imposed upon the said A. F. Judd and S. B. Dole as aforesaid be defined and determined."

After proceedings before Judge Cooper, a Circuit Judge of such Circuit, who resigned his office before reaching a decision, the matter came up before Judge Perry of the same Circuit, who, on the 16th day of April, 1896, reserved certain questions of law to the Supreme Court, as follows:

- 1.—Was a trust created in the property de-

vised to Irene Ii by the will of her father John Ii?

2.—If such a trust was created is the trust still in force, Irene having married, attained majority and had issue of said marriage, which issue still survive?

3.—If such a trust still exists is the interest of Iren Ii Brown under the same absolute or for life only?

4.—If such a trust still exists is it such a trust that the court will upon the proper motion order an immediate conveyance of the property to Irene Ii Brown?

5.—Has Irene Ii Brown a fee simple title on said property, or is her estate one for life only?

6.—Was an estate in perpetuity created by said will and if so was its effect to vest the estate absolutely in Irene Ii Brown?

7.—If there are any remainders in said property, are they vested or contingent and in what person?

8.—What legal and equitable estates have the several parties plaintiff and defendant under the will of John Ii and the circumstances shown by the pleadings and evidence? [321—263]

The Supreme Court, on the 4th day of May, 1897, ruled that the first question should be answered in the affirmative; that as to the second question, the trust became extinct upon the marriage and majority of the devisee Irene, and that as to the fifth question the devisee Irene had an estate in fee simple in the property devised to her by her father's will. It was

considered by the court that it was unnecessary to decide the other questions, in view of the rulings already made. No further proceedings appear to have been taken. The case was not remanded to the Circuit Court and no decree was entered in either court. This case will be hereafter referred to as the first case.

On the 27th of January, 1903, a bill in equity to declare and execute a trust was filed in the same Circuit Court by the said A. F. Judd, as next friend of George and Francis, minors, against C. A. Brown, John A. Magoon and Irene; which bill, after narrating the history of the proceedings relating to the estate of the said John Ii, deceased, alleged that the said will directed that if the said Irene should die, having borne children, the said property should descend to her children, but that she should be the first heir, meaning and intending thereby that during her life she should have the use and benefit of the said property, and that her children, by virtue of said will, are "the absolute owners in fee" of the same, subject only to their said mother's life estate; and further alleged the divorce of the said Irene from the said defendant C. A. Brown, and the execution of a deed of conveyance by them of the "said property" in trust for the organization of a corporation to hold the same and to deliver one-third of the shares thereof to the said Irene, one-third to the said Brown, and a third to the plaintiffs, [322—264] which corporation was duly organized under the name of The John Ii Estate Limited, and delivery of shares made accordingly, except that one share of those to

be issued to said C. A. Brown was caused by him to be issued in the name of J. A. Magoon, one of the defendants hereto; and contended that the defendants held such shares subject to a trust that upon Irene's death the same shall be assigned to the plaintiffs.

The bill thereupon contended that no legal adjudication had been made of said questions of law,—referring to the reserved questions upon which the Supreme Court had ruled as set forth above, for the following reasons, to wit:

- 1.—No decree was made in any of such proceedings;
- 2.—In all such proceedings, the children and Irene were represented by the same counsel although their interests were conflicting;
- 3.—No court which was organized as required by the Constitution of the Republic of Hawaii had obtained appellate jurisdiction of any of the said reserved questions of law;
- 4.—The jurisdiction of the said Supreme Court concerning the construction of the said will,—if it ever existed, ended upon its determination that no trust was in existence concerning the said property;
- 5.—All matters of law arising and pending in the first case before Judge Cooper, were required by law to be decided by him and by no other court or judge, and the same, nothing having been decided by him, were not lawfully presented or decided by any other court or judge;
- 6.—There was no statutory or other authority

to reserve questions of law in the first case for the opinion of the Supreme Court and such reserved questions of law did not lawfully come before such court, and so it had no jurisdiction thereof;

7.—Judge Whiting of the Supreme Court had no constitutional authority to reorganize the Supreme Court, two of the justices thereof being disqualified, by installing two members of the bar of the Supreme Court to sit in their places for the decision of such questions;

8.—After argument upon such reserved questions before such court, upon the withdrawal of one of such substituted justices, before an opinion was reached by such court, a new court to hear argument and decide such questions could not be lawfully organized.

The bill prayed, among other things, for an order restraining the defendants from disposing of the shares held by them as aforesaid, and that they be decreed to assign the shares held by them to a trustee in trust during the life of [323—265] said Irene, to pay the income thereof to those entitled thereto and at her death to assign all of the said shares to the plaintiffs; and for general relief.

The bill was demurred to on general and special grounds, one of the latter being to the effect that "It does not appear that any of the property or estate of the plaintiffs was conveyed to said corporation either by them (Irene and C. A. Brown) or by any persons purporting to act in their behalf."

The court sustained the demurrers on the ground

that the deed of conveyance referred to, which was made a part of the bill, did not convey or purport to convey the estate of the plaintiffs in the "said property,"—the estate of John Ii, deceased, supposing they had an estate therein.

The plaintiffs thereupon amended their bill by adding thereto averments of intention on the part of the grantors of the said deed of conveyance to convey to trustees for the organization of a corporation the fee simple of the lands devised by the will to the plaintiffs, and that the ownership in fee simple in such lands was claimed and exercised by the said corporation by virtue thereof; that the defendants claimed that the said proceedings and decision of the Supreme Court were conclusive upon the plaintiffs and forever barred them from setting up any title under the said will to the said lands, and that by reason of the said decision of the Supreme Court, they have been deprived of trustees as provided by the said will for the protection of their interests as remaindermen, and that unless the invalidity of said proceedings and decisions, and also the plaintiffs' titles therein claimed, be declared by the court, a cloud will rest upon their title, and their rights as such remaindermen may be subject to costly and difficult legislation. The [324—266] fourth paragraph of the prayer was amended to read as follows: the additional words I have placed in italics: 4. For such other, further and appropriate relief, orders and decrees as the nature of the case may require, *and specifically, that a declaratory decree be made declaring that the proceedings, decision and convey-*

ance herein mentioned are invalid and of no effect as against the plaintiffs."

The bill as amended was demurred to on the same grounds and the demurrers sustained,—the judge ruling that the new allegations did "not take the case out of the rules set out in the former decision unless the bill is now good as a bill *quia timet*," and decided that, it being apparent from the pleadings that the plaintiffs were out of possession of the land, and, moreover, had their remedy in the statutory action to quiet title, the demurrers must be sustained on this point. A decree was made dismissing the bill and giving costs to the defendants. This case will be referred to as the second case.

The plaintiffs appealed to the Supreme Court where the decree was affirmed and the case remanded to the Circuit Judge.

The contentions in the present case in relation to the first case as made by the briefs are similar to those raised in the second case, without including the fifth and eighth points of the latter, and with the additional point by counsel of the Estate to the effect that federal courts are precluded by their precedents and the rule established by the Supreme Court of the United States from reviewing the judgments of the highest tribunals of the several states of the American Union, upon questions of the construction and validity of municipal law, except where some federal question is involved. The application of this rule to the Territory [325—267] of Hawaii was recognized by Judge Estee in *Hawaiian Tramway Co. vs. Rapid Transit & L. Co.*, 1 U. S. Dist. Ct. Haw., 164,

177-8; by Judge Woodruff of this court in the *Atch-erley* habeas corpus case, decided September 4th, 1909, and by Judge Robertson of this court in the case of *Y. Soga et al. vs. Jarrett*, decided March 22d, 1910.

With this statement of the case, it becomes necessary to ascertain the extent to which this court is or may be limited in its freedom of consideration, by the litigation that has already taken place, referring to the well established rule that in the consideration of the constitution or laws of a State, federal courts follow the construction given by the highest court of the State. *Wilson vs. North Carolina*, 169 U. S. 586, 592-3. It appears that two of the judges of the Supreme Court, being disqualified to sit at the hearing and consideration of the said reserved questions, the remaining judge, in supposed accordance with the constitution of the Republic of Hawaii, Art. 83, Sec. 1, and section 56 of Chapter 57 of the laws of 1892, requested and authorized two members of the bar of the Supreme Court to sit in the places of the disqualified judges at the trial of the said case. The court, so constituted, heard argument in the matter of the reserved questions and took the same under consideration, but, before reaching a conclusion thereon, one of such substituted judges resigned his position as such judge and withdrew from further connection with the case. Thereupon, on motion of counsel for the plaintiff, the same judge of the Supreme Court requested and authorized the remaining substituted judge and another member of the bar of the Supreme Court to sit with him in the determination [326—

268] of the said case. The court so constituted heard argument in the matter of the said reserved questions and thereupon filed its decision as hereinbefore set forth,—finding that a trust had been created in the property devised to Irene by the will of her father and that such trust had terminated upon her marriage and majority; and also that she had an estate in fee simple in the property devised to her by such will.

The plaintiffs in the second case contended, points seven and eight, that the said remaining judge of the Supreme Court had no constitutional right to request or authorize the said two persons to sit with him as justices of the Supreme Court in the places of the two disqualified justices; and that after the court so constituted had heard argument in the case and taken the same under consideration, “a new court to rehear said argument and decide” the said case upon the withdrawal of one of such substituted judges without joining in an opinion thereon, “could not be and was not lawfully organized.”

On appeal in this case, the Supreme Court, construing the applicable constitutional and statutory provisions, ruled that “It is at least doubtful whether the Constitution (Const. 1894, Art. 83, Sec. 1) did not permit the places of two disqualified members of the court to be filled with substitutes at the same time. The statute clearly did in terms at least. C. L. Sec. 1170. That has been the practice acquiesced in for years under the statute. The court was a *de facto* court and the decisions of a *de facto* court are not void and cannot be questioned collaterally.” Brown

vs. Brown, 15 Haw. 312. This finding appears to beg the question whether or not the court so constituted was a court *de jure*, as it relies upon the rule of authority of *de facto* officers for its conclusion upholding the authority of the court. Under the rule, therefore, [327—269] above set forth, it has no binding effect upon this court; and if it is contended that in such finding the Hawaiian court intimated its views of the meaning of the constitutional provision in question, it cannot be seriously argued that the federal courts are bound by such an intimation, which is no more than a suggestion and which is not relied on by the court making it. *Burgess vs. Seligman*, 107 U. S. 20, 23-4; *Stanly County vs. Coler*, 190 U. S. 437, 444-5.

We find two main contested points as to the validity of the decision in the first case. First, was the alleged court which made the decision in that case a legal court? and second, if so, had it jurisdiction to authoritatively dispose of certain questions of law reserved by a Circuit Judge at Chambers and certified up for its decision?

While this court holds itself free to review the ruling that the court in the first case was a *de facto* court, as held in the second case, it does not deem it to be necessary to take up this point in view of its opinion on the second point reserved above, which point is stated by the following question: If the court in the first case was a qualified court, had it jurisdiction to authoritatively dispose of the questions of law or law and fact reserved and certified to it by a Circuit Judge in Chambers?

The laws providing for the reservation of questions to the Supreme Court are as follows: "The Supreme Court shall have appellate jurisdiction to hear and determine all questions of law, or of mixed law and fact, which shall be properly brought before it by reservation of any Circuit Court or Judge." S. L. 1892, c. 57, sec. 51; Civ. L. sec. 1164; R. L. sec. 1628. Also "Whenever any question of law shall arise in any trial or other proceeding before a Circuit Court, the presiding judge may reserve the same for the consideration [328—270] of the Supreme Court." S. L. 1892, c. 57, sec. 72; Civ. L. sec. 1436; R. L. sec. 1862.

The local Supreme Court made a definite construction of these enactments on this point in 1896 in the following words: "There is no authority, statutory or otherwise, for the reservation of questions to this court by a Circuit Judge sitting in equity at Chambers." *Booth vs. Baker*, 10 Haw. 543, 546 (1896). This is a construction of statutes by which this court is bound under the rule above recognized. The remaining question then on this point is the one of jurisdiction. The Supreme Court in the second case used the following language on this point: "Granting that the Supreme Court did not have jurisdiction of reserved questions in equity, still was the defect such as to make the decision absolutely void? "The court had equity jurisdiction on appeals and "it also had jurisdiction of reserved questions in law cases. The defect lies in the method of bringing the question up to this court. The questions were "reserved by the Circuit Judge at Chambers instead

"of in court. In our opinion it is not such a defect "as renders the decision absolutely void." *Brown vs. Brown, supra*, 312. I am not able to agree with this opinion. The case did not reach the Supreme Court by appeal, nor through any method, authorized by statute, of reserving questions to that court by a lower court, as conceded. It cannot be ascertained that it was before the court in a legal sense or in any way that gave jurisdiction. The county commissioners "have no authority to reserve questions of "law for the determination of this court, and cannot, "by so doing, vest in the court jurisdiction to hear "and determine such questions." *County Commissioners of Hampshire*, 140 Mass. 181, 182; *Bearce vs. Bowler*, 115 Mass. 129; *Terry vs. Brightman*, 129 Mass. 535. [329—271]

There being no jurisdiction the decision of the court was void, as fully so as if it had been made by any other three members of the bar. If a court "act "without authority, its judgments and orders are "regarded as nullities. They are not voidable, but "simply void; and form no bar to a recovery sought, "even prior to a reversal in opposition to them. They "constitute no justification; and all persons concerned in executing such judgments or sentences, "are considered, in law, as trespassers." *Elliot vs. Peol*, 26 U. S. 328, 340; *Williamson vs. Berry*, 49 U. S. 508, 555; *Lewers & Cooke vs. Redhouse*, 14 Ha 290, 294. And if the second decision suggests, as appears to do, that the question of jurisdiction made, and has been, waived in this case (*Brown vs. Brown, supra*), the answer is, jurisdiction of the sub-

ject matter cannot be conferred by consent or waiver. *Dudley vs. Mayhew*, 3 N. Y. 9, 12; Cooley's Const. Lim. (7th ed.) 575-6.

A third point was also considered, i. e. whether the court in the first case had jurisdiction to construe the will after deciding that there was no longer any trust in existence; and while the court in the second case conceded that the court in the first case should have declined to construe the will, it held that this was an error that did not make the decision void, and that it "as well as other alleged defects above mentioned," was a matter that might be waived by the then plaintiff minors so as to preclude a collateral attack by them, citing *Brown vs. Brown*, *supra*, 312, 315. It is true that minors may waive objection to error apparent on the record that do not involve jurisdiction of the suit. *Kingsbury vs. Buckner*, 134 U. S. 350, 674. As this point however is one of the plaintiffs' contentions in the second case, it clearly has not been waived by them. [330-272]

Counsel for the children make the further contention that, inasmuch as no decree was entered in the first case, the decision therein, which is an answer to the said reserved questions, does not constitute a bar to the present proceeding. The court sustains this contention. "The confirmation has not reached the stage yet where it has become *res adjudicata* and can operate as an estoppel. There is as yet no final decree." *Bouldin vs. Phelps*, 30 F. R. 5; *Oklahoma vs. McMaster*, 196 U. S. 529, 533; *Sprink vs. Brien*, 128 N. Y. 99. It is pertinent here to mention the significant circumstance that both the de-

ions in the first case and in *Both vs. Baker, supra*, which was also a case of reserved questions from a Circuit Judge in equity at Chambers, record an expression against any binding effect of their action as a precedent. They obviously took up the consideration of such questions as a matter of assistance to the judge reserving them, not deeming that their findings would have any legal effect unless they should form the basis of a decree by such judge.

The contention is made by counsel of the Estate that as the decision in the second case approves the decision in the first case and declares it to be binding on the parties, a rule is made to be followed by the federal court. To meet this contention let us find out what the decision really decided, it being obvious that it made no pretension of passing upon the construction of the John Ii will or of adjudicating the title to the land in question. Judge Gear's decisions, taking them together, sustained the demurrers and decreed the dismissal of the bill on the grounds (1) That the allegations did not show a conveyance of the children's interests. (2) That the bill showed the plaintiffs to be out of possession, which circumstance made the bill as bad as a [331—273] bill *quia timet*, and (3) They had their statutory remedy at law in an action to quiet title, where it was immaterial whether they were in possession or not. On appeal to the Supreme Court, the decree was affirmed on the first and third grounds and then the court took up the questions of the effect of the first decision and the conveyances as clouds on the alleged title of the children. Was not the issue then before the appellate

court, whether the decree should be sustained on the grounds upon which it was made? The other questions raised by the demurrers and considered by the Supreme Court were not considered by the court below and formed no basis of its decree. They were these, i. e. (1) whether the court which made the decision in the first case was a qualified court; (2) whether such court if qualified had jurisdiction of the questions reserved to it by a Circuit Judge sitting in equity at Chambers, and (3) whether it had jurisdiction to construe the will after deciding that the trust created by it had terminated. The court ruled on these questions as heretofore set forth. Do these rulings create a rule that this court must follow?

Where a demurrer is sustained for want of equity "the estoppel extends only to the precise point presented by the pleadings and decided by the ruling upon the demurrer." *Dennison vs. Scharf*, 121 F. R. 313, 318; *Wiggins vs. Railway*, 142 U. S. 396, 410.

On the question of the force of a judgment as an estoppel, "where a number of issues are presented the finding on any one of which will warrant the verdict and judgment, it is competent to show that the finding was upon one rather than on another of these different issues." *Washington etc. Co. vs. Sickles*, 65 U. S. 333, 345; *Russell vs. Place*, 94 U. S. 606, 608; *De Sollar vs. Hanscome*, 158 U. S. 216, 221. [332—274]

A decree sustaining a demurrer is no bar to subsequent proceedings upon facts and questions of law not litigated or passed upon by such decree. *Detrick*

vs. Sharrar, 95 Pa. St. 521, 525-6. A decree sustaining a demurrer on the ground that the bill showed an adequate remedy at law, is no bar to new proceedings. *Detrick vs. Sharrar, supra*, 525.

"If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."

Hughes vs. United States, 71 U. S. 232, 237;
Converse vs. Davis, 90 Tex. 462, 466.

The Supreme Court has "jurisdiction to hear and determine all questions of law or of mixed law and fact which shall be properly brought before it on exceptions, error or appeal." R. L. sec. 1628. The only questions "properly brought before" the Supreme Court in this matter were the reasons announced by Judge Gear as the bases of his decree and the decree itself. Where a decree "refers to the opinion of the trial judge in terms that make it clear that the object was to refer to it, to explain what was determined, and the reasons therefor, then such opinion becomes legitimately a part of the record, and must be looked to, to explain what was *in issue* and what was determined by the judgment or decree in question." *Legrand vs. Rixey's Adm.*, 3 S. E. 864, 871. In harmony with this is the rule that the opinion of the court affirming such decree, is inadmissible to show that the question determined was different from that in the record. *Robinson vs. New York etc. Co.*, 18 N. Y. S. 728, 730.

With the showing made, I cannot find that the second case has affirmed the decision in the first case, especially as to its ruling that Irene had an estate in fee simple in the lands devised to her by her father.

[333—275]

The counsel for the children further contends that they were not parties to the first case and so no jurisdiction was acquired over them. It appears that the first case which was brought by A. F. Judd for himself and as next friend on behalf of Irene,—a married woman, and George and Francis,—minors, was signed "A. F. Judd" with the name of counsel typewritten; and the amended bill in which Sanford B. Dole was joined with the said A. F. Judd, was signed "A. F. Judd, Sanford B. Dole," with the names of counsel typewritten as before. Under these circumstances this contention is supported both by precedent and good policy. *Chapman vs. Publishing Co.*, 128 Mass. 478, 479; *Eveland vs. Stephenson*, 45 Mich. 394, 396; *Davis vs. Davis*, 19 N. J. Eq. 181; *Nightingale vs. Railway Co.*, 18 F. C. (#10264) 239; *Mitford & Tyler's Pl. & Pr. in Equity*, 66, 145-6. The bill and the amended bill being signed by the alleged trustees without the signatures of counsel as to the children and Irene, were good as their bills only. Although it is true that jurisdiction in the subject matter of a suit cannot be conferred by consent or waiver, yet it would seem that jurisdiction of the person may be thus conferred. Has this defect been waived by the children?

The object of the second case was to procure the reversal of the decision in the first case. In the sec-

ond case the above point was not raised and as they had full opportunity of raising it, they may be considered as having waived it. They did, however make the contention that in the first case they and their mother, Irene, were represented by the same counsel, which contention would appear to contest the jurisdiction of the courts in the first case over their persons, and is inconsistent with any theory of a waiver of such point. And in the present case the point has been urged with great earnestness, with the resulting proposition, which cannot [334—276] be denied, that they were not therefore represented at all or, at least, insufficiently upon the question of their title to their grandfather's estate. The court had decided that Irene had a fee simple estate in the land devised to her and her children by her father's will; and yet she and the children were represented in this case in which their conflicting interests were considered and disposed of, by the same next friends and the same counsel. It is inconceivable that an issue of title in the lands devised to these persons by the will of John Ii was contemplated by the men who brought and conducted the first case. It is obvious from a reading of the prayers in both the bill and the amended bill that no such question was intended to be submitted, and yet in stating the real issue, which was that the said Judd and Dole be "re-instated as executors and trustees of said will and estate," and that the terms and provisions of said will and the duties and obligations imposed upon them be determined, the amended bill, referring to provisions for the children and for the support of

Irene, says, "It is important to obtain a construction of such provisions and the relative rights under said will of such minor children and the said Irene Haalou Ii Brown and the said Charles A. Brown in and to the said estate and to the income thereof." These words must have been misleading to the courts concerned in the first case, if indeed, the determination of the duties and obligations [335—277] of the alleged trustees, and the "construction of . . . the relative rights under such will of such minor children and the said Irene Haalou Ii Brown and the said Charles A. Brown in and to the said estate and to the income thereof," did not require a construction of the will on the issues upon which such construction was made. However this may be, it appears that the claims of the children were considered and a decision rendered unfavorable to them, while they were represented, if at all, by the same counsel and next friends who represented their mother in whose favor the question of the title of the lands in question was decided. It is clear that they have never had their day in court on that question.

Under this analysis it does not appear that the findings referred to of the Supreme Court are *res judicata* and a bar upon the grounds insisted on to the consideration of the question involved, by this or any court. [336—278]

And it still stands that if the decision in the first case was void, as found above, its affirmance, if it was affirmed in the second case, which is extremely doubtful, gave it no validity whatever. *Chambers vs. Hodges*, 23 Tex. 105, 111.

It appears from the precedents that the jurisdiction of a court whose proceedings are relied upon in support of rights claimed in another court, may be inquired into by that court. This freedom of action is in accordance with the duty of a court to dispose of every question which is relevant to the issue before it; a judgment by a court without jurisdiction being a nullity, it is vital that another court before which such judgment is cited should ascertain this fact.

“Neither orders nor decrees in chancery can be reviewed as a whole in a collateral way. But it is an equally well-settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject, may be inquired into in every other court, when the proceedings in the former are relied upon, and brought before the latter by a party claiming the benefit of such proceedings. The rule prevails, whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery or the municipal laws of states.” *Williamson vs. Berry*, 49 U. S. 508, 554-5; *Guaranty Trust Co. vs. Green Cove Railroad*, 139 U. S. 137, 147; *Defiance Water Co. vs. Defiance*, 191 U. S. 184, 194.

The court is therefore brought to the consideration of the claims to the fund in court for distribution under the provisions of the will of John H; and, although not bound by the findings in the first and second cases, yet the court holds that such findings

with the reasons given therefor are entitled to its respectful and earnest consideration. The decision in the first case quotes the following rule from *Fowler vs. Duhma*, 42 N. E. 623, 631; "The testator's intention to express a contingency to happen after [337—279] "his death, to affect the estate devised "to the first taker, must appear distinctly from the "clear and consistent language of the whole will." This rule, which is generally accepted, may be more specifically stated as follows: The rule of construction which applies to a devise with a devise over contingent on the death of the first devisee without issue, is, that where the devise is in terms that denote an intention that the latter shall take a fee upon the death of the testator, the contingency is the death of the devisee without issue during the life of the testator, but, surviving the testator, he takes an absolute estate in fee simple; but where the terms of the first devise are *indefinite* and are not inconsistent with a construction by which a life interest only is conferred the devise is held to create a life interest only, there being in that case, no obstacle in the way of giving full force to the contingent devise, and such conclusion in both cases being a reasonable construction of the intent of the testator from the words of the instrument. *Cooper vs. Cooper*, 1 K. & J. 658; 69 Eng. Reprint, 624; 2 Jarman on Wills (6th Am. ed.) 722, star page 1600, and 723, star page 1601; *Wright vs. Charley*, 129 Ind. 257, 28 N. E. 706; *Fowler vs. Duhma*, *supra*, 627. It is obvious that a devise to one and "in case of his death" to another, must confer an absolute title on the first devisee if he survives the testator, as death during

the life of the testator must be meant, there being nothing more certain and less contingent than death sometime. But where the devise over is contingent upon the death of the first devisee without issue or with issue, a contingency is created and the alternative rule set forth above applies. [338—280]

The opinion in the first case cites the case of *Hemen vs. Kamakaia*, 10 Haw. 547, in support of its finding that "by the provisions of this will the birth of a child has made the estate in the daughter Irene an indefeasible estate in fee simple." The will in the cited case has this provision. "If perchance any of my heirs mentioned above shall die without a child (this however does not apply to my wife) no part of his or her share shall pass if she wills it away to another; but it shall descend to his or her brother or sisters . . . and their descendants and shall be divided equally according to their respective rights." It was decided that the title of one of these daughters to the land devised to her became absolute upon the birth of her child. We find the following clause in the Ii will, "If my daughter should die having borne children, then the property shall descend to her children, and if she should die without having had any children the property shall descend to her own mother." If the will contained the latter part of this clause and not the first part, the rule recognized in *Hemen vs. Kamakaia* would obviously apply, but does not the intention so clearly expressed in the first part prevent its application? The language leaves no room for doubt as to the testator's intention. The event of death after having borne children is a contingency which is not limited to the period before

the testator's death. The uncontested allegations appear in the record that the said John Ii was about sixty-nine years old and Irene only a few months old when the will was executed. These are circumstances to be considered in construing this part of the will, if any construction is necessary, and makes it seem unlikely that he contemplated the possibility of the death of his daughter after having reached maturity and given [339—281] birth to children and all in his own lifetime. The opinion declares in substance that the words, "if my daughter should die having borne children then the property shall descend to her children," mean that upon the birth of a child the estate vested in her in fee simple. I cannot agree with the contention that would take away from these words their obvious meaning,— words which are without vagueness or uncertainty. The Rule in Shelly's case will not be applied when it defeats the clear intention of the testator. *Thurston vs. Allen*, 8 Haw. 392, 400. Under the rule of construction given above it is the devise showing an intention to give a fee, which is held to convey a fee to the first taker even in spite of a contingent devise over. This is fully recognized by counsel for the Estate in their brief, and also that such devise to the first taker may convey a life estate instead of a fee, if that appears "distinctly from the clear and consistent language of the whole will" to be the testator's intention. *Fowler vs. Duhma*, *supra*, 623; Brief, p. 11. Counsel for the Estate contend that in the John Ii will a fee was "plainly created in the first instance." Brief, p. 16. The preliminary words of the devise are, "all my property both real

and personal shall descend to my heirs who are mentioned below as follows": Irene, the daughter, Maraea, the wife, and J. Kamoikehuehu, the brother, are mentioned as first, second and third hoolina or heirs, or devisees; Kamealani and Judd, to whom real estate was devised without limitations, were not described by any words denoting heirship. It is significant that the word hoolina (heir) is used in connection with only the three devisees who were his statutory heirs, and not with the other two who had no claim on him by kinship. His former position as a judge of the Supreme Court had doubtless acquainted him with the Hawaiian statute of descent, and he may [340—282] have deemed it a desirable thing to classify those of his devisees who were statutory heirs as such. The use of the word hoolina (heir) can have no other significance than this, in view of the fact that it is not used in reference to the other devisees, nor the significance intimated by counsel's brief, twelfth page, as tending to show that Ii intended his daughter to have the full benefit of his estate. The will gives intrinsic evidence of having been drafted by one who, although somewhat acquainted with the Hawaiian laws of descent, had little knowledge of the intricate rules which have grown up in common law countries in regard to the construction of wills. It contains no words expressive of an intention to create a fee in the first statement of the devises, but leaves the meaning to be gathered by the subsequent provisions. There are subsequent provisions in reference to the devises to Kamoikehuehu, Kamealani and Judd.

The wife's devise of land is limited by the provision that she cannot devise it, and by the condition that if she should marry again, it would descend to the daughter. Are the words "if my daughter should die having borne children, then the property shall descend to her children," words of limitation, meaning the same as the words to *my daughter and her heirs*, as is assumed by the court in the first case? *Brown vs. Brown*, 11 Haw. 47, 52. The general rule is that "the word children is a word of purchase and not equivalent to the word *heirs* in the absence of other words or circumstances showing it to have been used in that sense." 5 Am. & Eng. Ency. Law, 1092; *Buffar vs. Bradford*, 2 Atk. 221, 222; 26 Eng. Reprint, 537; *Annable vs. Patch*, 20 Mass. 360, 363; *Stokes vs. Tilly*, 9 N. J. Eq. 130; *Tayloe vs. Gould*, 10 Barb. 388. In the latter case the words of the devise were "to my beloved daughter . . . and such her child or children as shall at her decease be living and shall [341—283] have attained or shall thereafter attain the age of twenty one years." The court said, "It seems to me very plain that the words of "the *ill* under consideration, tested even by the rigid "rule as it stood before the adoption of the revised "statutes, would be regarded as words of purchase "and not words of limitation." *Reimer vs. Reimer*, 44 Atl. 316, 129 Pa. St. 571, cited by counsel for the Estates fully supports the same rule. The case of *In re Vilsack's Estate*, 57 Atl. (Pa.) 32, cited by counsel for the Estate is not a case in point for that side but sustains the rule just referred to. The will gave certain property to his sons and daughters,

"during their natural lives share and share alike and after the death of either of" them, "to their child or children (should they leave any children at their death) the share held by my sons and daughters at the time of his or her death." So far the devise conforms to the devise to Irene in the John Ii will, and the court said, "had he stopped here there could be no question that the word 'children' was used in its ordinary sense as a word of purchase, and that his sons and daughters only took a life estate." The court decided on other grounds not pertinent here, that the word "children" was necessarily used "in its comprehensive and extended sense, meaning issue or heirs of the body," which ruling gave the fee to the sons and daughters.

The case of *McCullough vs. Johnetta Coal Co.*, 59 Atl. 984, 210 Pa. St. 22, cited by counsel for the Estate, is not in point, as the devise ran, after a provision for distribution in case of devisee's death without issue, "but should my son have heirs or issue then this land shall be his and his heirs." In the case before the court there is no devise to Irene and her heirs nor anything equivalent to it unless the expression "if my daughter shall die and she should have [342—284] issue, then the estate shall descend to her children," is equivalent.

The case of *Parker vs. Iasigi*, 138 Mass. 416, cited in support of the contention that "a devise in fee clearly manifested in the early clauses of a will is not to be cut down by later clauses," does not apply to the issue before the court, there being no "devise in fee clearly manifested in the early" or any clause

of the will under consideration, and the point in the cited case being that the later clauses referred to other matters. See *Noble's Estate*, 182 Pa. St. 188, 193.

In *Curry vs. Patterson*, 183 Pa. St. 238, 38 Atl. 594, a devise of the income of certain real estate during the "natural lifetime" of the devisee, subject to certain charges, the same to "descend to his heirs" at his death, was decided to give a fee simple title under the Rule in Shelly's case, the word "heirs" being given its usual technical meaning. "Not only as to the persons to take but as to the mode of taking the words are strictly technical"; and referring to these technical words the decision uses this strong language, "The Rule in Shelly's case is applicable without regard to the actual intent of the testator." This view of the paramount force of the rule held by a court of the State of Pennsylvania, a jurisdiction where the Rule in Shelly's case is perhaps more strongly entrenched than anywhere else, can hardly be followed by this court. It was distinctly repudiated by the Hawaiian Supreme Court in February, 1892, in the case of *Thurston vs. Allen*, 8 Haw. 392, 400; and although "the common law of England, as ascertained by English and American decisions," subject to some local limitations, was enacted as the common law of the Hawaiian [343—285] Islands in the latter part of the same year, the extreme position of the Pennsylvania court can hardly be regarded as in force here in view of the considerable variance of both English and American courts therefrom, even though the enactment referred to may not

be repealed by the Revised Laws.

“In the absence of some absolute and controlling rule of law to the contrary, the intentions of a testator, as deduced from the language of the will, construed in the light of circumstances surrounding him at the date of its execution, always control as to the disposition of the estate.” *Adams vs. Cowen*, 177 U. S. 471, 475; *Smith vs. Bell*, 31 U. S. 44; *Reck’s Appeal*, 78 Pa. St. 432; *Wright’s Appeal*, 89 Id. 67.

The Rule in *Shelly’s* case cannot be regarded by this court as such an absolute and controlling rule.

The trend of the cases submitted on this point by counsel for the Estate, is according to the accepted rule already referred to with approval, which does not recognize a second disposition of property which has already, in the same instrument, been given in fee, if real estate, or absolutely, if personal estate. The counsel for the Estate insist that the preliminary devise to Irene in her father’s will, plainly creates a fee. Let us refer to the will, briefly, and omitting the parts not pertinent to this question, we find the following, according to a translation which is accepted by all the parties, except as to a disputed sentence hereinafter referred to: “My property both real and personal shall descend to my heirs who are mentioned below as follows: First. Irene Haalou Ii, my own daughter is the first heir as follows: (description of lands) and one half of all my personal property. Second. My wife Marae Ii is my second heir (description of lands) and one-half of all my personal property; and in

case my wife marries again this land shall descend to my daughter, she cannot bequeath [344—286] it to any one. Third. My brother J. Komoikehuehu is the third heir (description of lands) those are the lands I bequeath to him. Fourth. My interest in the land of Naaiheli, my deceased younger brother is for his widow Kamealani. Fifth. My land (description of land) is for A. F. Judd, and that is his land that I bequeath to him. . . . I do hereby appoint J. Komoikehuehu, A. F. Judd, they both to be the executors and guardians of the person and property of my daughter the first devisee mentioned in this will. . . . They two alone shall have the sole care of it (income of her lands) until she becomes of age or has children of her own; they shall be the executors during the lifetime of my daughter and her children in accordance with my wishes as expressed in this will, and they shall receive compensation the same as provided by law the first fruits received from the lands of my daughter, that is, the money received, there shall be taken therefrom ten cents from each dollar which is set apart as an offering to God's Kingdom the same as I have done, and my executors are to carry out this request of mine. And further, if my daughter should die having borne children, then the property shall descend to her children and if she should die without having had any children the property shall descend to her own mother, and if she should be dead then the property shall descend to my brother J. Komoikehuehu."

The word "hoolina," which is translated "heir" in

the first, second and third bequests, is translated "devisee" in the clause appointing the executors and guardians of the daughter who is referred to as the "first devisee mentioned in this will," thus making the words *heir* and *devisee*, in the translation, synonymous. Either translation is correct except as the context may require one rather than the other. It [345—287] does not therefore appear from a reference to the will that the word *hoolina* has any definite meaning as to the character of the devise, it being probably, as already suggested, merely a classification of the statutory heirs of the testator. If this conclusion is correct, we have to look to other parts of the will for words expressing the intent of the testator; where there are none the devise is absolute, or a fee simple, if of the real estate. *Hemen vs. Kamakaia*, 10 Haw. 547; *King vs. King*, 215 Ill. 100, 110. There are no further expressions relating to the devises to J. Komoikehuchu, Kamealani and A. F. Judd, and it is not doubted that they take in fee simple. The devise of land to the wife is cut down by additional words to an estate less than a fee. The devise to the daughter is followed by the additional words quoted above; and if we take them in their common and untechnical meaning, as I submit we must take them, they express an intention that the daughter should have a life estate, with remainder to her children or, failing children, to his wife or to his brother. The case of *King vs. King, supra*, is identical with this as to this point, the words of the will being, after the devise without words of inheritance, "in case of the death of daughter and she left one or

more children, then the property goes to them when of age." The court decided that this gave her a life estate, she having had children. The foregoing conclusion is consistent with the provision in the will devoting ten per cent of the income of the lands "of my daughter,"—this "first fruits," "as an offering to God's Kingdom the same as I have done"; a provision which, it can hardly be doubted, contemplated a continuing administration of the property by the executors and guardians. [346—238]

There is a clause in the will of doubtful meaning, which if given a certain interpretation that it seems capable of, tends to strengthen the above ruling. This is in the following quotation: "they two alone shall have the sole care of it (income from lands) until she becomes of age or has children of her own; they shall be executors during the lifetime of my daughter and her children in accordance with my wishes as expressed in this will." The words "or has children of her own," are the translation of the Hawaiian words "*a hanau paha kana mau keiki.*" The translation given makes the next sentence repugnant to and inconsistent with the sentence preceding such words, and there is no way out of the difficulty if the given translation is retained. A number of experts have been consulted by the Court and by counsel and their several translations are before the Court. All but two of these give substantially the same rendering as that given in the agreed translation on file; but one of them, who must be recognized as an authority, Rev. H. H. Parker, has given the following rendering: "*and in the event of her giving*

birth to children," and Mr. Hopkins, a Hawaiian, has given a similar rendering. Upon the examination of a majority of these experts the majority of those testifying conceded that the words were capable of the translations made by Mr. Parker and Mr. Hopkins. The clause with the new translation reads as follows: "they two alone shall have the sole care of it (income from lands) until she becomes of age, *and in the event of her giving birth to children*, they shall be the executors during the lifetime of my daughter and to her children following, in accordance with my wish as expressed in this instrument." With this rendering the discrepancy is removed and the parts of the clause are in harmony [347—289] with each other and the whole clause is in harmony with the obvious and untechnical meaning of the final provision of the will. In accordance with the accepted policy of the construction of doubtful passages, a translation that removes a discrepancy, if it is reasonably within the bounds of grammatical and etymological interpretation, is to be preferred to one that fails to do so. I feel that I am justified in accepting the new translation of the words in question on this ground, and it being admitted by several of the other experts that the words are capable of such rendering.

Although important deals in real estate have taken place in relation to the lands devised to Irene and the children, in accordance with the findings of the Supreme Court in the first case, yet the rule of *Stare Decisis* does not properly apply, there being no construction of statutes or findings fixing methods in

relation to business transactions. No rule of property has been established. "A rule of property is a settled legal principle governing the ownership and devolution of property." *Yazoo vs. Adams*, 32 S. 937, 946. Simply a will has been construed in one case and it does not appear from an examination of other adjudged cases by the same court, that such construction is or has become a settled rule of property in the Hawaiian Islands.

Counsel for the Estate make the point that a long submission by the minors to the decision in the first case would estop them from contesting these proceedings, even if such decision was void in the first case. Let us see what their submission, if any, has amounted to. When the first case was brought in April, 1894, George was six and one-half years and Francis six months old. The decision, which consisted [348—290] of answers to the reserved questions filed by Judge Perry, was made in May, 1897. As already shown there was no decree filed in this case, and the deed of July 2, 1897, made under its authority was not recorded for four years and four months afterwards, and the second case was brought within fifteen months after such registration, in January, 1903, George then being about fifteen and Francis about ten years old. The decree dismissing this case on demurrer was affirmed on appeal in November, 1903. On September 21st, 1909, notice in the case of *United States vs. John Ii Estate, Limited, et al.*, was given to counsel of George and Francis, the former having reached his majority about two years before and the latter being still a minor, and to

the other defendants in the said case, that ten thousand dollars was on deposit in this court in favor of such of the defendants as should show that they were entitled thereto. *Calims* were therefore filed by George and the counsel of Francis, each for an undivided one-third of the said fund, subject to a life interest therein of Irene Ii Holloway or the said John Ii Estate Limited as the assignee of such life interest; and these claims have been persistently pushed in this court.

I do not find any conduct in these circumstances that estop these children from contesting the decision in the first case. The second case and the events leading up to it show that there was no submission up to that time. They were minors then and long afterwards and by analogy of the statutes of limitation and by precedent the rule of estoppel does not run strictly against minors, if at all. *Brown vs. McCune*, 5 Sanford, 224; *M'Coon vs. Smith*, 3 Hill, 147; *Mahoney vs. Van Winkle*, 21 Cal. 552, 581-2; *Lackman vs. Wood*, 25 Cal. 147, 153. The decree in the second case with the expression of opinion by the Supreme Court made their nonaction [349—291] thereafter sufficiently excusable, until the opportunity occurred in connection with the case of the United States vs. John Ii Estate, Limited, et al., in this court, for renewing the fight which had previously been conducted by next friends. The promptitude with which the contest was renewed and the *eterprise* with which it has been carried on, would seem inconsistent with any idea of submission or of giving up.

The further point is made that George by accept-

ing the share of the dividends of the John Ii Estate, Limited coming to him has ratified the deed from Irene and C. A. Brown to the Estate and is thereby estopped from claiming any of this fund. No authorities are offered in support of this contention. The law of estoppel *in pais* has changed since the times of the earlier common law. It could only apply to this point of the case if there had been some act or conduct on the part of George which has induced a change of position of those who allege an estoppel or their privies in accordance with his real or apparent intention. Bigelow on Estoppel, 454; 11 Am. & Eng. Ency. Law, 387. Nothing of the kind exists in the record. When the deed was executed in 1897, George was a minor about ten years old. This deed appears to have been in the nature of a compromise between Irene and C. A. Brown, in which the children, under the *status* of the Estate as it existed under the first and second decisions, may be considered to have been generously treated. But George had no part in it and there is no element of estoppel in the fact of his receiving the gratuitous dividends that were allowed him by his parents. There is nothing in the second ground of estoppel offered,—that because his right to the possession of the Estate, “according to his own contention, would be postponed until after Irene’s [350—292] death, it becomes more apparent that he is estopped to dispute the deed.” 1 Brief 2.

And important consideration now has to be taken up and that is, how will transactions entered into under the rulings of the first and second cases be

affected by a reversal. This subject must be considered in connection with the interests of the children which are involved in the decision of this case. If this Court is correct in finding that by the will of their grandfather they are entitled to two-thirds of the fund in court, subject to their mother's life interest therein, then they are also entitled to two-thirds of the lands of his estate, subject to such life interest. They have repudiated the transaction by which they would receive about one-third of the Estate in present enjoyment, in lieu thereof. There would be an obvious injustice to them in compelling them to accept this arrangement and forego the estate that is due them upon a certain contingency. On the other hand it is suggested that important dispositions of the Estate have been made by those in control of it, and within their apparent powers, under which rights have accrued to the Estate and their lessees. No testimony has been offered as to the extent and character of such dispositions or of the present value of the landed property devised to Irene and her children; it is, however, agreed by counsel that the court may assume this to be over half a million dollars. Under these circumstances, with such large interests in the children, subject to the contingency named, and with their mother, Irene, apparently in the prime of life, the Court does not feel that there is sufficient ground to justify any hesitation toward awarding the children a decree recognizing their full rights under their grandfather's will. [351—293]

“Where a question involving important private and public rights has been only once passed

upon, and cannot be said to have been acquiesced in, it is the duty of the Court to re-examine such question judicially when properly called upon, or if the decision is clearly incorrect and no injurious results will be likely to flow from a reversal, and especially if it is injurious and unjust in its operation, it is the imperative duty of the Court to reverse it." 1 Herman on Estoppel, 123, sec. 117; *Linn vs. Minor*, 4 Nev. 462.

It is admitted by all parties that Irene has had only three children,—George, Francis and Bernice Ii, and that the latter died in infancy. By the Hawaiian law of descent of property, Irene and C. A. Brown, the parents of Bernice Ii, are her heirs.

A decree will be entered requiring the said fund of ten thousand dollars to be paid to a qualified trustee satisfactory to this Court, who shall be required to invest such fund and pay the income thereof, subject to proper charges, to the Estate during the lifetime of Irene, and at her death to pay one-third of the principal and accrued increment to George or his representatives, one-third to Francis or his representatives, and one-sixth to the representatives of the said Irene and one-sixth to the said C. A. Brown or his representatives, with the contingent provision that if any other children should be hereafter born to the said Irene, such distribution to be made according to the interest of all her children and their representatives under the rule set forth in the foregoing decision.

/S/ SANFORD B. DOLE,
Judge, United States District Court.

[Endorsed]: 58. No. 47. United States District Court, Territory of Hawaii. United States of America, Plaintiff, vs. John Ii Estate, Limited, et al., Defendants. Decision. Filed Thursday, Sept. 1, 1910. A. E. Murphy, Clerk. By /S/ A. A. Deas, Deputy Clerk. [352—294]

Exhibit No. 19.

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

No. 47.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN II ESTATE, LIMITED, an Hawaiian Corporation; CARL S. HOLLOWAY; IRENE II HOLLOWAY; FRANCIS HYDE II BROWN; GEORGE II BROWN; IRENE II HOLLOWAY, as Guardian of the Persons and Estates of FRANCIS HYDE II BROWN and GEORGE II BROWN; and CHARLES A. BROWN; JOHN A. MAGOON; ALFRED W. CARTER, SIDNEY M. BALLOU and IRENE II HOLLOWAY, Directors of the JOHN II ESTATE, LIMITED,
Defendants.

Judgment and Decree of U. S. District Court.

The claims of defendants John Ii Estate, Limited, a corporation, George Ii Brown and Francis Hyde Ii Brown, a minor, to the sum and fund of TEN THOUSAND DOLLARS (\$10,000.00) on deposit in

the registry of said Court in said entitled cause having come on to be heard before the Honorable Sanford B. Dole, Judge of said court, sitting without a jury, a trial of said matters by jury having been theretofore waived in and by the written consent and stipulation of all of said claimants, said written stipulation being now in the files of said cause and court, and Messrs. Magoon & Weaver appearing for said John Ii Estate, Limited, a corporation, and Messrs. Thompson, Clemons & Wilder appearing for George Ii Brown and for A. A. Wilder, guardian *ad litem* of Francis Hyde Ii [353—295] Brown, a minor, and after hearing the evidence and the argument of counsel the said matters having been by all of said claimants submitted to the said Court for decision, and said Court having considered the premises and being fully advised as to the same, and said Court having on the first day of September, 1910, found

That the land condemned in the above entitled action for which said sum of Ten Thousand Dollars (\$10,000) was paid into the registry of said Court was owned in fee simple by one John Ii;

That said land was devised by the last will and testament of said John Ii to his daughter Irene Ii for her life, remainder in fee to her children;

That said Irene Ii married C. A. Brown and had three children born to her, namely, George Ii Brown, Francis Hyde Ii Brown and Bernice Ii Brown;

That said Bernice Ii Brown died in infancy in the year 1894, and said Irene Ii Brown and C. A. Brown thereupon inherited all of the property of said Bernice Ii Brown;

That said Irene Ii Brown and C. A. Brown thereafter conveyed all their interests in said land to said John Ii Estate, Limited;

That said Irene Ii Brown and C. A. Brown were thereafter divorced, and said Irene Ii Brown thereafter married C. S. Holloway.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

That said John Ii Estate, Limited, is entitled during the life of said Irene Ii Holloway to the net annual income from the said sum of Ten Thousand Dollars (\$10,000);

That after the death of said Irene Ii Holloway said sum of Ten Thousand Dollars (\$10,000) belongs absolutely [354—296] in equal shares to said George Ii Brown, his heirs or assigns, said Francis Hyde Ii Brown, his heirs or assigns, said John Ii Estate, Limited, as the assignee of the heirs of said Bernice Ii Brown, and any other child or children that may hereafter be born to said Irene Ii Holloway;

That the Clerk of this Court is directed to distribute and pay said fund of Ten Thousand Dollars (\$10,000) to said John Ii Estate, Limited, as trustee, to hold the same in trust and to invest the same and to pay the net income therefrom during the life of said Irene Ii Holloway to said John Ii Estate, Limited, and upon the death of said Irene Ii Holloway to pay said principal sum of Ten Thousand Dollars (\$10,000) and accrued increment as follows:

One-third to said John Ii Estate, Limited, the assignee of the said Irene Ii Holloway and the said C.

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A. Brown, one-third to said George Ii Brown, his heirs or assigns, and one-third to said Francis Hyde Ii Brown, his heirs or assigns; provided, however, that if any other children shall hereafter be born to said Irene Ii Holloway, the said principal sum of Ten Thousand Dollars (\$10,000) and accrued increment shall be paid by said trustee on the death of said Irene Ii Holloway in equal shares to said John Ii Estate, Limited, said George Ii Brown, his heirs or assigns, said Francis Hyde Ii Brown, his heirs or assigns, and to each of such other children, his (or her) heirs or assigns.

Given, made and dated at Honolulu, Territory of Hawaii, this 8th day of October, 1910.

(Sgd.) SANFORD B. DOLE,

Judge of the Above-entitled Court. [355—297]

The form of the foregoing Judgment and Decree is hereby approved.

(Sgd.) MAGOON & WEAVER,

Attorneys for John Ii Estate, Limited.

(Sgd.) THOMPSON, CLEMONS & WILDER,

Attorneys for George Ii Brown and A. A. Wilder,
Guardian *ad Litem* of Francis Hyde Ii Brown,
a Minor.

(Sgd.) A. A. WILDER,

Guardian *ad Litem* of Francis Hyde Ii Brown, a
Minor. [356—298]

[Endorsed]: No. 47. (Title of Court and Cause.)
Judgment. Entered in J. & D. Book 2, at pages 119-
120. Filed, Oct. 8, 1910. A. E. Murphy, Clerk. By
(Sgd.) A. A. Deas, Deputy Clerk. [357—299]

Admission of Service of Bill of Exceptions.

Omitted. [358]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

No. 47.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN II ESTATE, LIMITED, an Hawaiian Corporation; CARL S. HOLLOWAY; IRENE II HOLLOWAY; FRANCIS HYDE II BROWN; GEORGE II BROWN; IRENE II HOLLOWAY, as Guardian of the Persons and Estates of FRANCIS HYDE II BROWN and GEORGE II BROWN; and CHARLES A. BROWN, JOHN A. MAGOON; ALFRED W. CARTER, SIDNEY M. BALLOU and IRENE II HOLLOWAY, Directors of the JOHN II ESTATE, LIMITED,

Defendants.

Notice to Join in Writ of Error.

To Carl S. Holloway, Irene Ii Holloway, and to Alfred W. Carter, Sidney M. Ballou, and Irene Ii Holloway, Directors of John Ii Estate, Limited.

PLEASE TAKE NOTICE THAT

the John Ii Estate, Limited, Charles A. Brown and John Alfred Magoon, Directors of the John Ii Estate, Limited, are about to apply to the Hon. S. B.

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Dole, Judge of the District Court of the United States for the District and Territory of Hawaii, for a writ of error to review the decision and judgment of the United States District Court for the Territory of Hawaii, and that they demand and request and notify you to join in the application for such writ of error. [359]

Dated Honolulu, March 16, 1911.

JOHN II ESTATE, LIMITED.

CHARLES A. BROWN,

JOHN ALFRED MAGOON,

Directors of the John Ii Estate, Limited,

By (Sgd.) MAGOON & WEAVER,

Their Attorneys.

Service by copy admitted this 16th day of March, 1911.

SIDNEY M. BALLOU,

By (Sgd.) His Attorneys,

KINNEY, BALLOU, PROSSER & ANDERSON.

(Sgd.) ALFRED W. CARTER.

(Sgd.) C. S. HOLLOWAY.

(Sgd.) IRENE II HOLLOWAY.

[Endorsed]: No. 47. (Title of Court and Cause.) Notice to Join in Writ of Error. Filed March 20, 1911. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. Magoon & Weaver, 188 Merchant St., Honolulu, T. H., Attorneys for John Ii Estate, Ltd. [360]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

JOHN II ESTATE, LIMITED, an Hawaiian Corporation, and **CHARLES A. BROWN** and **JOHN A. MAGOON**, Directors of the **JOHN II ESTATE, LIMITED**,

Defendants,

Plaintiffs in Error,

vs.

FRANCIS HYDE II BROWN, a Minor, and **A. A. WILDER** as Guardian of **FRANCIS HYDE II BROWN**, and **GEORGE II BROWN**,

Defendants,

Defendants in Error.

Petition for, and Order Allowing, Writ of Error.

The above-named defendants John Ii Estate, Limited, an Hawaiian Corporation, Charles A. Brown and John A. Magoon, Directors, of John Ii Estate, Lt'd, Claimants, plaintiffs in error, conceiving themselves aggrieved by the Order, Decree and Judgment of said Court during the trial of the above-entitled action, and by the entering of Judgment of said Court, on the 8th day of October, A. D. 1910, in said action, does hereby petition that a Writ of Error from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States of America in and for the District and Territory of Hawaii, be allowed, and that the same issue to said District Court, and that a transcript of Records, Proceedings and Papers upon which said rul-

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ings and said Judgment was made, duly authenticated, may be sent to said Circuit Court of Appeals.

(Sgd.) P. L. WEAVER,

Attorney for John Ii Estate, Lt'd... [361]

Order That Writ Issue.

The foregoing Petition having been presented with the Assignment of Errors, and it appearing that the petitioner is entitled thereto, it is ordered that the Writ of Error as prayed for be allowed.

(Sgd.) S. B. DOLE,

Judge.

Admission of Service of Copy of Petition and Order.

Honolulu, City and County of Honolulu,
Territory of Hawaii,—ss.

Due legal service of the within and foregoing Petition and Order is hereby admitted this 20th day of March, A. D. 1911.

THOMPSON, CLEMONS & WILDER,

(Sgd.) C. C. B.,

Attorneys for George Ii Brown and Francis Hyde Ii Brown, a Minor, by His Guardian *ad Litem*, A. A. Wilder.

[Endorsed]: No. 47. (Title of Court and Cause.)
Petition for Writ of Error and Order Allowing Same. Filed March 20, 1911. A. E. Murphy, Clerk.
By (Sgd.) F. L. Davis, Deputy Clerk. Philip L. Weaver, 188 Merchant St., Honolulu, T. H., Attys.
for Plaintiffs in Error. [362]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

JOHN II ESTATE, LIMITED, an Hawaiian Cor-
poration, and CHARLES A. BROWN and
JOHN A. MAGOON, Directors of the JOHN
II ESTATE, LIMITED,

Defendants,

Plaintiffs in Error,

vs.

FRANCIS HYDE II BROWN, a Minor, and A. A.
WILDER, as Guardian of FRANCIS HYDE
II BROWN, and GEORGE II BROWN,

Defendants,

Defendants in Error.

Assignment of Errors.

Now on this 20th day of March, A. D. 1911 comes
the JOHN II ESTATE, LIMITED, CHARLES A.
BROWN and JOHN A. MAGOON, plaintiffs in Er-
ror, by P. L. Weaver, their attorney, and say: that
in the Records and proceedings in the above-entitled
cause there is manifest error in this, to wit:

I.

That the District Court of the United States in and
for the District and Territory of Hawaii erred in its
judgment in holding that "said land was devised by
the last will and testament of said John Ii to his
daughter, Irene Ii, for her life, remainder in fee to
her children."

II.

That said Court erred in holding "that said John

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II [363] Estate, Limited, is entitled to and owns absolutely one-third of the said sum of Ten Thousand Dollars, namely: \$3,333.33."

III.

That the said Court erred in holding that, "said John Ii Estate, Limited, is entitled, during the life of Irene Ii Holloway, to the net income from the remaining two-thirds of said sum of Ten Thousand Dollars, namely: \$6,666.67."

"That after the death of Irene Ii Holloway, said sum of \$6,666.67 belongs absolutely, in equal shares, to said George Ii Brown and Francis Hyde Ii Brown, and to any other children that may hereafter be born to said Irene Ii Holloway."

IV.

That the Clerk of said court erred in adjudging and ordering in his judgment herein, "that the Clerk of the court is directed to distribute said fund of Ten Thousand Dollars as follows:

To pay one-third thereof, namely: \$3,333.33 to said John Ii Estate, Limited, absolutely.

To pay the remaining two-thirds thereof, namely: \$6,666.67 to said John Ii Estate, Limited, as Trustee, to hold the same in trust and to invest the same and to pay the net income thereof during the life of said Irene Ii Holloway to said John Ii Estate, Limited, and upon the death of said Irene Ii Holloway to pay said principal sum and accrued increment in equal shares to said George Ii Brown and Francis Hyde Ii Brown or their respective representatives, provided that if any other children shall be hereafter born to said Irene Ii Holloway, said principal sum

and accrued increment shall be paid on the death of said Irene Ii Holloway in equal shares to said George Ii Brown and Francis Hyde Ii Brown, and such other children, [364] or their respective representatives."

V.

That the said Court erred in adjudging in the Judgment herein, "that all costs incurred shall be paid by and taxed against said John Ii Estate, Limited."

VI.

That the said Court erred in refusing to find and adjudge that the land contained was devised by the last will and testament of said John Ii to his daughter, Irene Ii, and to her heirs and assigns forever in fee simple absolutely.

VII.

That the said Court erred in refusing to adjudge that the Clerk of the court distribute the sum of Ten Thousand Dollars to John Ii Estate, Limited.

WHEREFOR John Ii Estate, Limited, Claimant, prays that the order and judgment of said District Court of the United States of America in and for the District and Territory of Hawaii be reversed, and that a new trial be granted to said Claimant.

Honolulu, T. H., March 20, 1911.

(Sgd.) P. L. WEAVER,

Attorney for Plaintiff in Error. [365]

**Admission of Service of Copy of Assignment of
Errors.**

Honolulu, City and County of Honolulu,
Territory of Hawaii,—ss.

Due legal service of the within and foregoing Assignment of Errors is hereby admitted this 20th day of March, A. D. 1911.

THOMPSON, CLEMONS & WILDER,
(Sgd.) C. C. B.,

Attorneys for George Ii Brown and Francis Hyde
Ii Brown, a minor, by His Guardian *ad Litem*,
A. A. Wilder.

[Endorsed]: No. 47. (Title of Court and Cause.)
Assignment of Error. Filed March 20, 1911. A. E.
Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy
Clerk. Philip L. Weaver, 188 Merchant St., Honolulu,
T. H., Attorneys for Plaintiffs in Error.
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*In the District Court of the United States in and for
the District and Territory of Hawaii.*

JOHN II ESTATE, LIMITED, an Hawaiian Corporation, and CHARLES A. BROWN and JOHN A. MAGOON, Directors of the JOHN II ESTATE, LIMITED,

Defendants,

Plaintiffs in Error,

vs.

FRANCIS HYDE II BROWN, a Minor, and A. A. WILDER, as Guardian of FRANCIS HYDE II BROWN, and GEORGE II BROWN,

Defendants,

Defendants in Error.

Writ of Error.

The United States of America,—ss.

The President of the United States of America,
To the Honorable, the Judge of the District
Court of the United States in and for the District and Territory of Hawaii, Greetings:

Because in the record and proceedings, as also in the rendition of the Judgment of a plea, which is in the said District Court before you, between the United States of America, Plaintiff, vs. John Ii Estate, Limited, an Hawaiian Corporation; Carl S. Holloway; Irene Ii Holloway; Francis Hyde Ii Brown; George Ii Brown; Irene Ii Holloway, as Guardian of the persons and estates of Francis Hyde Ii Brown and George Ii Brown; and Charles A.

Brown; John A. Magoon; Alfred W. Carter; Sidney M. Ballou and Irene Ii Holloway, Directors of the John Ii Estate, [367] Limited, Defendants, and wherein John Ii Estate, Limited, Charles A. Brown and John A. Magoon, Claimants, Defendants, are Plaintiffs in Error herein, and George Ii Brown and Francis Hyde Ii Brown, a minor, by his Guardian *ad litem*, A. A. Wilder, Claimants, Defendants, are Defendants in Error herein; manifest error hath happened to the great damage of the said John Ii Estate, Limited, a corporation as by its complaint appears, we, being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to parties aforesaid, in their behalf do command you, if judgment be given therein, that then under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same in the City of San Francisco in the State of California within thirty days from the date of this Writ, to wit, on the 21st day of April, 1911, in the said Circuit Court of Appeals to be then and there held; that the records and proceedings aforesaid being inspected, said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, the 22d day of March, in the year of

our Lord, 1911, and of the Independence of the United States 135.

[Seal]

A. E. MURPHY,

Clerk of the District Court of the United States of America in and for the District and Territory of Hawaii. [368]

Order Allowing Writ of Error.

The foregoing Writ of Error is hereby allowed this 22d day of March, A. D. 1911.

S. B. DOLE,

Judge of the District Court of the United States of America in and for the District and Territory of Hawaii.

[Endorsed]: No. 47. (Title of Court and Cause.) Writ of Error. Filed March 22, 1911. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [369]

In the District Court of the United States in and for the District and Territory of Hawaii.

JOHN II ESTATE, LIMITED, an Hawaiian Corporation, and CHARLES A. BROWN and JOHN A. MAGOON, Directors of the JOHN II ESTATE, LIMITED,

Defendants,

Plaintiffs in Error,

vs.

FRANCIS HYDE II BROWN, a Minor, and A. A. WILDER, as Guardian of FRANCIS HYDE II BROWN, and GEORGE II BROWN,

Defendants,

Defendants in Error.

Citation on Writ of Error.

The United States of America,—ss.

The President of the United States of America,
To George Ii Brown and Francis Hyde Ii
Brown, a Minor, and A. A. Wilder, as Guardian
ad Litem of Francis H. I. Brown, Greetings:

You and each of you are hereby cited and admonished to be and appear in the Circuit Court of Appeals for the Ninth Circuit to be held in the city of San Francisco, State of California, within thirty days from the date of this Writ, to wit, on the 21st day of April, 1911, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States of America in and for the District and Territory of Hawaii, wherein the John Ii Estate, Ltd., Charles A. Brown and John A. Magoon, Directors, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment [370] rendered against the said plaintiffs in error as in said Writ of Error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD D. WHITE,
Chief Justice of the Supreme Court of the United States, this 22d day of March, 1911, and of the Independence of the United States 135.

S. B. DOLE,
Judge of the District Court of the United States in
and for the District and Territory of Hawaii.

Admission of Service of Citation on Writ of Error.

Due and personal service of the above Citation and receipt of copy hereof is hereby admitted this 24th day of March, A. D. 1911.

THOMPSON, CLEMONS & WILDER,

C. C. B.,

Attorneys for George Ii Brown and Francis Hyde Ii Brown, a Minor, by his Guardian *ad Litem*, A. A. Wilder.

[Endorsed]: No. 47. (Title of Court and Cause.) Citation on Writ of Error. Filed March 24th, 1911. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. [371]

In the District Court of the United States in and for the District and Territory of Hawaii.

JOHN II ESTATE, LIMITED, an Hawaiian Corporation, and CHARLES A. BROWN, and JOHN A. MAGOON, Directors of the JOHN II ESTATE, LIMITED,

Defendants,

Plaintiffs in Error,

vs.

FRANCIS HYDE II BROWN, a Minor, and A. A. WILDER, as Guardian of FRANCIS HYDE BROWN, and GEORGE II BROWN,

Defendants,

Defendants in Error.

Supersedeas and Cost-Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS that we, the JOHN II ESTATE, LIMITED, a Corporation, CHARLES A. BROWN and JOHN A. MAGOON, plaintiffs in Error, as Principals, and JOHN HENRY MAGOON as Surety, are jointly and severally held and firmly bound unto George II Brown and Francis Hyde II Brown, a minor, by his guardian *ad litem*, A. A. Wilder, defendants in Error, and to each of them in the full and just sum of Five Hundred Dollars, to be paid to the said George II Brown and Francis Hyde II Brown, a minor, by his guardian *ad litem*, A. A. Wilder, defendants in Error, or their attorneys, representatives, successors or assigns, to which payment well and truly to be made we bind ourselves, our successors, representatives and assigns, jointly and severally, firmly by these presents. [372]

WITNESS our hands and seals this 23d day of March, 1911.

WHEREAS, lately at a session of the District Court of the United States of America in and for the District and Territory of Hawaii, in a suit pending in said court between United States of America, as Plaintiff, vs. John Ii Estate, Limited, an Hawaiian Corporation; Carl S. Holloway; Irene Ii Holloway; Francis Hyde Ii Brown; George Ii Brown; Irene Ii Holloway, as Guardian of the Persons and Estates of Francis Hyde Ii Brown and George Ii Brown; and Charles A. Brown; John A. Magoon; Alfred W. Carter; Sidney M. Ballou and Irene Ii Holloway,

Directors of the John Ii Estate, Limited, Defendants; and the said United States of America having no interest in the controversy and the said John Ii Estate, Limited, Defendant, a claimant, being at issue with George Ii Brown and Francis Hyde Ii Brown, a minor, by his guardian *ad litem*, A. A. Wilder, the Judgment was rendered against the said Defendant, John Ii Estate, Limited, and adjudged that the claim of said George Ii Brown and Francis Hyde Ii Brown, a minor, by his guardian *ad litem* A. A. Wilder, be granted as claimed; and the said John Ii Estate, Limited, having obtained from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States of America in and for the District and Territory of Hawaii, a Writ of Error to reverse the Judgment of the said District Court, and having filed a copy thereof in the Clerk's Office of the said District Court, and our Citation directed to the said John Ii Brown and Francis Hyde Ii Brown, a minor, by his guardian *ad litem* A. A. Wilder, defendants, is about to be issued citing and admonishing them and each of them [373] to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, State of California, in the said Circuit Court at the 2d day of October, 1911.

NOW, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the said John Ii Estate, Limited, a Corporation, plaintiff in error, shall prosecute the said Writ of Error to effect, and shall answer all damages and costs that may be awarded against it after the sale, to make its plea good, then

the above obligation is to be void; otherwise to remain in full force and virtue.

Honolulu, T. H., March 23, 1911.

[Seal] **JOHN II ESTATE, LIMITED,**
A Corporation.

By (Sgd.) C. S. HOLLOWAY,
Its President.

By (Sgd.) J. ALFRED MAGOON,
Its 1st Vice-President.

(Sgd.) J. ALFRED MAGOON,

(Sgd.) JOHN HENRY MAGOON,

CHAS. A. BROWN,

By his Atty. in Fact,

(Sgd.) J. ALFRED MAGOON.

Honolulu, City and County of Honolulu,
Territory of Hawaii,—ss.

John Ii Estate, Limited, by J. Alfred Magoon, J. Alfred Magoon, Chas. A. Brown by J. A. Magoon and John Henry Magoon, whose names are subscribed to the foregoing Bond, being sworn, depose and say that they are resident householders and freeholders within the District and Territory of Hawaii; that they have in their own right to the sum of Five Hundred Dollars in property within said District, over and above all just debts and liabilities, exclusive of

property set apart from execution.

JOHN II ESTATE, LIMITED,

By Its 1st Vice-president,

(Sgd.) J. ALFRED MAGOON.

(Sgd.) J. ALFRED MAGOON.

(Sgd.) J. ALFRED MAGOON.

For CHAS A. BROWN,

As His Attorney in Fact.

(Sgd.) JOHN HENRY MAGOON.

[374]

Subscribed and sworn to before me this 23d day of March, 1911.

[Seal]

(Sgd.) P. L. WEAVER,

Notary Public.

Order Approving Bond.

The foregoing Bond is hereby approved this 24th day of March, A. D. 1911.

(Sgd.) S. B. DOLE,

Judge of the District Court of the United States of America in and for the District and Territory of Hawaii.

[Endorsed]: No. 47. (Title of Court and Cause.) Supersedeas and Cost Bond on Writ of Error. Filed March 24th, 1911. A. E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy Clerk. Philip L. Weaver, 188 Merchant St., Honolulu, T. H., Attys. for Plaintiffs in Error. [375]

*In the District Court of the United States in and for
the District and Territory of Hawaii.*

No. 47.

JOHN II ESTATE, LIMITED, an Hawaiian Cor-
poration, and CHARLES A. BROWN and
JOHN A. MAGOON, Directors of the JOHN
II ESTATE, LIMITED,

Defendants,
Plaintiffs in Error,
vs.

FRANCIS HYDE II BROWN, a Minor, and A. A.
WILDER, as Guardian of FRANCIS HYDE
II BROWN, and GEORGE II BROWN,

Defendants,
Defendants in Error.

Praeceptum for Transcript.

A. E. Murphy, Esq.,

Clerk of the Above-entitled Court:

You will please prepare a Transcript of the Rec-
ord in this cause (the same being originally entitled
The United States of America, Plaintiff, vs. John Ii
Estate, Limited, an Hawaiian Corporation; Carl S.
Holloway; Irene Ii Holloway; Francis Hyde Ii
Brown; George Ii Brown; Irene Ii Holloway as
Guardian of the Persons and Estates of Francis Hyde
Ii Brown and George Ii Brown; and Charles A.
Brown; John A. Magoon; Alfred W. Carter; Sidney
M. Ballou and Irene Ii Holloway, Directors of the
John Ii Estate, Limited, Defendants No. 47), to be
filed in the office of the Clerk of the United States

Circuit Court of Appeals for the Ninth Circuit under the Writ of Error heretofore sued out and perfected to said Court, and include in said Transcript [376] the following pleadings, proceedings and papers on file, to wit:

1. Petition filed February 10, 1906.
2. Answer of Francis Hyde Ii Brown and George Ii Brown, filed March 20, 1906.
3. Answer of John Ii Estate, Limited, C. A. Brown and J. A. Magoon, Directors of said Corporation, filed March 24, 1906.
4. Stipulation waiving jury, filed September 10, 1906.
5. Judgment of Condemnation awarded the value of Ten Thousand Dollars, filed August 24, 1909.
6. Notice by Clerk to parties to make claim to share of Ten Thousand Dollars, filed September 21, 1909.
7. Claim of John Ii Estate, Limited, to total sum of Ten Thousand Dollars, filed October 6, 1906.
8. Statement of Claim by Francis Hyde Ii Brown, a minor, filed October 11, 1909.
9. Statement of Claim of George Ii Brown, filed October 11, 1909.
10. Stipulation substituting A. A. Wilder, Esq., for A. G. M. Robertson, Esq., as Guardian of Francis Ii Hyde Brown, filed January 31, 1910.
11. Order appointing A. A. Wilder, Esq., Guardian *ad Litem* of Francis Hyde Ii Brown, filed January 31, 1910.

12. Withdrawal of A. G. M. Robertson as Guardian *ad Litem*, filed January 31, 1910.
13. Appearance of Thompson, Clemons & Wilder for George Ii Brown, and A. A. Wilder, Guardian *ad Litem* of Francis Hyde Ii Brown.
14. Notice of Presentation of Bill of Exceptions, and Admission of Service, filed March 17, 1911.
15. Bill of Exceptions of John Ii Estate, Limited, filed March 17, 1911.
16. Notice of Intention to Apply for Writ of Error, filed March 20, 1911.
17. Petition for Writ of Error, with Admission of Service of Copy thereof, filed March 20, 1911.
18. Assignment of Errors, and Admission of Service of Copy thereof, filed March 20, 1911.
19. Order Allowing Writ of Error, filed March 20, 1911. [377]
20. Writ of Error (Original), filed March 20, 1911.
21. Citation on Writ of Error (Original), filed March 24, 1911.
22. Supersedeas and Cost Bond on Writ of Error, with qualification of parties, and Order approving Bond, filed March 24, 1911. (Original.)
23. Order Extending Time for Filing Record in Circuit Court of Appeals to the 20th day of June, 1911, filed March 28, 1911. (Original.)
24. This Praecept.

Said Transcript to be prepared as required by law and the rules of this court, and the rules of the United States Circuit Court of Appeals for the Ninth Cir-

cuit, and filed in the office of the Clerk of said Circuit Court of Appeals at San Francisco before June 20, 1911.

(Sgd.) PHILIP L. WEAVER,

Attorney for John Ii Estate, Limited, Charles A. Brown and J. Alfred Magoon.

[Endorsed]: No. 47. (Title of Court and Cause.)
Praecipe for Transcript. Filed April 3d, 1911. A.
E. Murphy, Clerk. By (Sgd.) F. L. Davis, Deputy
Clerk. [378]

[Certificate of Clerk U. S. District Court to Record.]

*In the United States District Court in and for the
District and Territory of Hawaii.*

United States of America,
Territory of Hawaii,—ss.

I, A. E. Murphy, Clerk of the United States District Court for the District and Territory of Hawaii, do hereby certify that the foregoing pages, numbered from 1 to ———, inclusive, is the true and correct transcript of the record and proceedings had in said court, in the case of The United States of America, Plaintiff and Petitioner, vs. John Ii Estate, Limited, an Hawaiian Corporation; Carl S. Holloway; Irene Ii Holloway; Francis Ii Hyde Brown; George Ii Brown; Irene Holloway, as Guardian of the Persons and Estates of Francis Ii Hyde Brown and George Ii Brown; and Charles A. Brown, John A. Magoon, Alfred W. Carter, Sidney M. Ballou and Irene Ii Holloway, Directors of the John Ii Estate, Limited, Defendants and Respondents, as the same remains

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1996.

THE JOHN II ESTATE, LIMITED, an Hawaiian Corporation, and Charles A. Brown and John A. Magoon, Directors of the John II Estate, Limited, Plaintiffs in Error.

vs.

GEORGE II BROWN and FRANCIS HYDE II BROWN, a Minor, and A. A. Wilder, as Guardian ad Litem of Francis Hyde II Brown, Defendants in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Printed Transcript of Record and Concerning Certain Title-Heads Therein.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing three hundred and ninety-four (394) pages, numbered from and including one (1) to and including three hundred and ninety-four (394), to be a full, true and correct copy of the Printed Transcript of Record upon writ of error to the District Court for the District of Hawaii in the above-entitled case, as the original thereof remains on file and of record in my office, the said copy having been printed under my supervision pursuant to the provisions of the twenty-third rule of the Rules of Practice of the said Circuit Court of Appeals.

I do further certify that the title-head "Opinion" printed in Gothic type at the head of the document commencing at page 151 of the Printed Transcript of Record in the above-entitled cause, does not appear at the head of said document in the original certified typewritten Transcript of Record in said cause, but was inserted at the head of said document in said printed Transcript of Record as a title-, ready-reference-, or index-head, pursuant to the practice and the provisions of section 4 of rule 23 of said Circuit Court of Appeals, which rule requires the clerk to index all records, and that the said title-head "Opinion" was based upon the title-head "Opinion of the Court by P. Neuman, Esq.," printed in capital letters, in pica type, and appearing in the same document, in lines 5, 6 and 7 of page 152 of said printed Transcript of Record, which latter title-head also appears in said document at page 157 of the original certified typewritten Transcript of Record in said cause.

I do hereby further certify that the title-head, "Opinion of Supreme Court in George II Brown et al., vs. Charles A. Brown et al.," printed in Gothic type at the head of the document commencing at page 225 of said printed Transcript of Record does not appear at the head of said document in the original certified typewritten Transcript of Record in said cause, but was inserted at the head of said document in said printed Transcript of Record as a title-, ready-reference-, or index-head, pursuant to the practice and provisions of Section 4 of Rule 23 of said Circuit Court of Appeals, which

rule requires the clerk to index all records, and that the said title-head "Opinion of Supreme Court in George H Brown et al., vs. Charles A. Brown et al.," was based upon the title-head "Opinion of the Court by Frear, C. J.," printed in capital letters, in pica type, and appearing in the same document, in lines 8, 9 and 10 of page 227 of said printed Transcript of Record, which latter title-head also appears in said document at page 157 of the original certified typewritten Transcript of Record in said cause.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 21st day of December, A. D. 1912.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,

*Clerk United States Circuit Court of Appeals
for the Ninth Circuit.*

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1993.

THE JOHN H ESTATE, LIMITED, an Hawaiian Corporation, et al.
Plaintiffs in Error.

vs.

GEORGE H BROWN et al., Defendants in Error.

Proceedings Had in the United States Circuit Court of Appeals for
the Ninth Circuit.

(Addenda.)

At a stated term, to-wit: the October Term, A. D. 1911 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court-Room thereof, in the City and County of San Francisco, in the State of California, on Friday, the twentieth day of October, in the year of our Lord One Thousand Nine Hundred and Eleven.

Present:

Honorable William B. Gilbert, Circuit Judge,
Honorable Erskine M. Ross, Circuit Judge,
Honorable William W. Morrow, Circuit Judge.

No. 1996.

THE JOHN H ESTATE, LIMITED, an Hawaiian Corporation, et al.
Plaintiffs in Error,

vs.

GEORGE H BROWN et al., Defendants in Error.

Order of Submission.

Ordered, above-entitled cause argued by Mr. Reuben D. Silliman, counsel for the plaintiffs in error, and by Mr. A. A. Wilder, counsel for the defendants in error, and submitted to the Court for consideration and decision.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1996.

THE JOHN II ESTATE, LIMITED, an Hawaiian Corporation, and Charles A. Brown and John A. Magoon, Directors of the John II Estate, Limited, Plaintiffs in Error.

vs.

GEORGE II BROWN and FRANCIS HYDE II BROWN, a Minor, and A. A. Wilder, as Guardian ad Litem of Francis Hyde II Brown, Defendants in Error.

Writ of Error to the United States District Court for the Territory of Hawaii.

(Opinion U. S. Circuit Court of Appeals.)

Petition of the United States to condemn certain real estate at Pearl Harbor on the Island of Oahu, in the Territory and District of Hawaii, for the uses and purposes of the United States. Jury waived. Award of ten thousand dollars to the owners of the land condemned. Conflicting claims. Distribution of the award. (1)*

This cause comes before this Court upon a writ of error to the United States District Court for the Territory of Hawaii to review the action of the Court in determining the claims of contesting claimants to a fund of \$10,000 paid into the registry of the Court by the United States for a tract of land, containing fifty acres, taken under condemnation proceedings.

On February 10, 1906 the United States filed its petition in condemnation proceedings in the United States District Court for the Territory of Hawaii for a tract of land having an area of fifty acres on Pearl Harbor, in the Island of Oahu in the Territory and District of Hawaii. The land described in the petition is a portion of the ahupaa (or tract) of Waipio, which was the property of one John II at the time of his death in 1870.

The defendants and respondents named in the petition in condemnation were the John II Estate, Limited, an Hawaiian corporation, Carl S. Holloway, Irene II Holloway, Francis II Hyde Brown, George II Brown, Irene II Holloway as Guardian of the Persons and Estate of Francis II Hyde Brown and George II Brown, and Charles A. Brown, John A. Magoon, Alfred W. Carter, Sidney M. Ballou and Irene II Holloway, Directors of the John II Estate, Limited.

Answers were filed by Francis Hyde II Brown, a minor, and George II Brown, a minor, by A. G. M. Robertson, their Guardian ad litem; and by the John II Estate, Limited, by Charles A. Brown, and J. Alfred Magoon, Directors. The only material issue raised in the answers was contained in the answer of the two minors by their guardian ad litem, in which it was alleged that their claims

(*Page number of Original Opinion.)

in and to said parcel of land were adverse to and in conflict with the claims of the other defendants, and that it would be necessary for the court (2) in the event of the prayer of the petition being granted to decide said respective claims and to apportion the money that might be adjudged to be paid by said petitioner for said land. The petition was heard by the court, and on August 24, 1909, judgment was entered, wherein it was adjudged that the land described in the petition should be condemned for the uses and purposes of the United States as in said petition alleged. The value of the tract of land condemned was fixed and determined to be the sum of ten thousand dollars, and this sum it was adjudged should be paid as compensation for said land to the defendants and respondents, or such of them as might thereafter be adjudged entitled thereto. The contesting claimants to this award were the John II Estate, Limited, claiming the whole of the award, and Francis Hyde II Brown, a minor and George II Brown, each claiming an interest in said award.

The John II Estate, limited, claimed the whole of the award upon the ground that the land for which the \$10,000 was paid belonged to the John II Estate, Limited, in fee simple; that the land was by John II devised in fee to Irene II by will; that said will was a limited to probate in the Supreme Court of the Hawaiian Islands on the 10th day of June, 1870, and confirmed to her by the decision of the Supreme Court of the Hawaiian Islands rendered May 4, 1897 (11 Hawaiian 47), and by said Irene II and her husband, Charles A. Brown, conveyed to Henry Holmes as trustee by deed dated July 2, 1897, and by Holmes conveyed to said John II Estate, Limited, by deed of July 9, 1897, and confirmed to said estate by decision of the Supreme Court of the Territory of Hawaii rendered November 21, 1903 (15 Hawaiian 308); that the right of the John II Estate, Limited, to the money was res judicata; that all the other defendants were estopped to claim the same; that no person had any interest, right, or claim in said money. (3)

In the claim of Francis Hyde II Brown it was alleged that the land was formerly owned in fee by John II, since deceased; that it was devised by will to his daughter Irene for life, and upon her death to her children, or, in the event of her not having borne children, then to her mother Maraea II, if then living, and if not then to the testator's brother J. Komoikehuchui; that thereafter Irene II became the wife of C. A. Brown, and at the time of filing the claim was then the wife of C. S. Holloway; that as a result of Irene II's marriage with C. A. Brown there were three children, namely, the claimant, Francis Hyde II Brown, and George II Brown, one of the respondents, and Bernice II Brown, who died in infancy; that by reason of these facts claimant became the owner of an undivided interest in said land in fee simple, and was entitled to a one-third share or interest in said fund, subject to the life interest therein of Irene Holloway, or the John II Estate, as the assignee of her life interest. And further answering the claim of the John II Estate, claimant alleged that the opinion of the Supreme Court of Hawaii, rendered on May 4, 1897 (11 Hawaiian 47), was not binding upon claimant, and did not

affect his title to said land, nor his right or claim in or to said fund, for the following, among other, reasons:

1. That the cause in which said opinion was rendered was a suit in equity, and the opinion was rendered upon questions reserved in said suit by the Circuit Judge before whom the suit came on for hearing, but the said Circuit Judge was without authority of law or jurisdiction to so reserve said questions in said suit.

2. That the said Supreme Court had no jurisdiction or authority to hear, determine or otherwise pass on the questions so reserved as aforesaid. (4)

3. That the said Supreme Court at the time of the rendition of said opinion was composed or constituted of Associate Justice Whiting of the Court, and two members of the bar of the Court, who sat as substitute Justices in the cause at the request of the said Associate Justice, but that the request was made without any right or authority of law; that the court as composed and constituted was not a legally constituted court, and its opinion was without legal effect.

4. That the claimant was not a party to said suit.

5. That the purported attempt of A. F. Judd to represent the claimant in said suit as his next friend was illegal, null and void, in that said Judd was at the same time acting, or purporting to act, as the next friend of claimant's mother whose interests in said suit were adverse to claimant's interests therein on the question as to the nature of the estate in said land devised to her by said will.

6. That the jurisdiction of the Supreme Court, if it ever acquired jurisdiction, in said suit, was, under the pleadings, limited to the determination of the question whether any trust was then in existence concerning the property devised by the will, and that its jurisdiction ended upon its determining that no such trust existed.

7. That no judgment, order or decree was ever made in any of the aforesaid proceedings in said suit in equity, pursuant to the opinion of the Supreme Court, or otherwise, adjudicating or determining the rights of claimant under said will in any of the property therein devised.

Further answering the claim of the John H Estate, Limited, the claimant alleged that the opinion of the Supreme Court of the Territory of Hawaii, rendered on November 21, 1903, (15 Hawaiian 308), did not adjudicate or determine claimant's right or title in any of the property devised by the will of (5) said John H, deceased, and did not affect the claimant's right of claim in or to said fund in court.

In the statement of the claim of George H Brown, impleaded as a minor, it was alleged that he arrived at the age of majority October 18, 1907, and alleging the prior proceedings substantially as did Francis Hyde H Brown, claimed an undivided interest in the land in fee simple, and entitled to a one-third share or interest in the fund, subject to the life interest therein of Irene H Holloway.

To fully understand the questions at issue between these claimants as to their alleged right to the fund in court, it will be necessary to state some of the material facts in the case in their chronological order. In doing so we will abbreviate names as was done by the

court below. The Estate of John II, Limited, will be referred to as the "Estate." The person named as Irene II Brown, and subsequently as Irene II Holloway, will be referred to as "Irene." The person named George II Brown will be referred to as "George;" and the person named as Francis II Brown will be referred to as "Francis;" and these two when mentioned collectively will be referred to as "the children."

On May 2, 1870, John II, an Hawaiian, a resident of the Island of Oahu, Hawaiian Islands, died leaving a large estate in real and personal property situated on the Island of Oahu and elsewhere in the Hawaiian Islands, which he devised by will (the original of which is in the Hawaiian language) duly admitted to probate in the Supreme Court of the Hawaiian Islands on the 10th of June, 1870.

A translation of the will was agreed upon by the parties to the action, the material portions of which are:

"* * * * * All my property, both real and personal, shall (6) descend to my heirs who are mentioned below as follows:

"First: Irene Haalou II, my own daughter, is the first heir as follows: (Here follows a description of certain lands, including the land condemned in this case.)

"And one-half of all my personal property.

"Second: My wife Maraea II is my second heir.

(Here follows description of certain lands.)

"And one-half of all my personal property; and in case my wife marries again this land shall descend to my daughter, she cannot bequeath to any one.

"Third: My brother, J. Komoikehuchu is the third heir (here follows a description of certain lands), those are the lands I bequeath to him.

"Fourth: My interest in the land of G. Naaiheli, my deceased younger brother, is for his widow Kamealani.

"Fifth: My land (here follows a description of certain lands) is for A. F. Judd, and that is his land that I bequeath to him. By this will I have appointed and I do hereby appoint J. Komoikehuchu, A. F. Judd, they both to be the executors and guardians of the person and property of my daughter the first devisee mentioned in this will.

"All the income from the lands that are leased and all other receipts from all the lands of my daughter they two alone shall have the sole care of it until she becomes of age *or has children of her own*; they shall be the executors during the lifetime of my daughter and her children in accordance with my wishes as expressed in this will, and they shall receive compensation, the same as provided by law.

* * * * *

"And the first fruits received from the lands of my daughter, that is, the money received there shall be taken therefrom ten cents from each dollar which is set apart (7) as an offering to God's Kingdom, the same as I have done, and my executors are to carry out this request of mine.

"And further, if my daughter should die having borne children, then the property shall descend to her children, and if she should

die without having had any children, the property shall descend to her own mother, and if she should be dead then the property shall descend to my brother, J. Komoikehuchu."

Irene li Holloway is the daughter of John li, deceased, and is the Irene Haalou li named in John li's will. Irene married Charles A. Brown September 30, 1886, and three children were born of the marriage—George li Brown, of full legal age on October 18, 1907, Francis Hyde li Brown, a minor, and Bernice li Brown, who died in infancy in 1894. Irene has no other children. In 1898 a divorce separated Irene and Charles A. Brown, and Irene afterward married Carl S. Holloway.

On July 2, 1897, Irene and Charles A. Brown conveyed their interest in the lands to Henry Holmes, as trustee, who, in the same month, conveyed to a corporation, the John li Estate, Limited, the plaintiff in error here. The stock of this corporation was issued, one-third to Irene, one-third to Charles A. Brown, and one-third to Henry Holmes, trustee for George li Brown and Francis Hyde li Brown, the surviving Brown children, in equal shares. The shares held by Henry Holmes as trustee for George li Brown have been turned over to him since he attained his majority; and he has, since his majority, received and accepted the monthly dividends paid upon his shares.

We come now to the first case in the Courts of Hawaii where this estate has been a subject of controversy.

The relative rights of Irene and her children and her husband, C. A. Brown, and the birth of her three children, A. F. Judd, one of the executors of the last will of John li, deceased, and one of Irene's guardians, after being discharged as such guardian, brought a bill in equity before a Circuit Judge in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, for himself and as next friend of the said Irene and her surviving children against C. A. Brown to declare and execute a trust and for an accounting, upon the proper construction of the will of John li, deceased.

The bill included a prayer that the Court construe and determine the relative rights of Irene and her children and her husband, C. A. Brown, in and to said estate under said will. The defendant Brown did not plead to this bill, but appeared specially for the purpose of asking the Court to dismiss the bill on the ground that the plaintiff Irene had filed her discontinuance of the suit. The bill appears not to have been satisfactory to Irene and by her attorneys Hatch and Magoon she asked leave of the Court by motion to discontinue all proceedings in the cause. After some controversy an amended bill was substituted for the original bill on August 10, 1894, with the same parties as plaintiffs and defendant, except that Sanford B. Dole, administrator with the will annexed and guardian, was joined therein as an additional party plaintiff.

In the original bill it was alleged, in substance, that John li died in 1870, leaving a large estate in the Islands, which he devised by a will duly admitted to probate, a copy of which was attached; that Judd and J. Komoikehuchu were duly appointed executors of the will and guardians of the personal property of Irene, then aged about nine months, and duly qualified as such executors and

guardians; that in 1875 said J. Komoikehuehu resigned his trust and Sanford B. Dole was (9) duly appointed in his place; that thereafter and until November 13, 1886, Judd and Dole performed their duties as such executors and guardians, and on that date applied to the Court for their discharge as guardians on the ground that their powers had ceased to be operative because of the marriage of Irene to C. A. Brown; that they were never discharged as executors of the will; that Judd, upon being appointed executor and guardian, received from the Court an instrument purporting to be a true and correct copy of the will of John H., upon which he exclusively relied in determining his powers and duties; that in the copy of the will the words: "O laua no no hooke kaohai ka wa e ola ana kuu kaikamahine a i kana mau keiki," meaning: "They two shall be the executors during the lifetime of my daughter and her children," were omitted; that Judd and Dole were, therefore, not fully advised of the true intent of the will, and supposed that no trust was created by said will that would not terminate when Irene attained her majority or married; that upon their discharge the guardians delivered to Irene and her husband all the property devised by the will to her; that by the terms of the original will Judd and Komoikehuehu were constituted the trustees of the property during the life of Irene, whether married or not. Judd as sole surviving trustee named in the will submitted the construction of the will to the adjudication of the Court, and asked that his duties and obligations as surviving trustee be authoritatively defined; that C. A. Brown had possession of the property and claimed the personal right to all rents, issues and profits, and the exclusive control and management thereof; that Brown denied the existence of any trust, refused to allow Judd to take possession of the property, and refused to account to any one for the rents, issues, or profits; that Brown had wasted, squandered and mismanaged the (10) estate, and had incurred large liabilities which he illegally sought to make a charge upon the estate; that Brown at the time of his marriage with Irene had full knowledge of the contents of the will; that he had failed to make any settlement upon his wife, and failed to make adequate or proper provision for her; that unless restrained, Brown would further waste and squander the estate and do irreparable injury thereto; that said Irene desired the Court to set apart a reasonable allowance for her out of the income of the estate to support herself and two children; that under the will provision was made for the children of Irene; and for the support of Irene; that it was important to obtain a construction of such provisions and the relative rights under the will of such children and Irene, and Brown in and to the estate, and to the income thereof, and to that end complainants prayed that the terms and provisions of said will and the duties and obligations imposed thereunder upon the said A. F. Judd as aforesaid be defined and determined and that the said Judd be reinstated as trustee.

The amended bill followed in the main the original bill, but omitted the allegations that Brown had wasted, squandered and

mismanaged the estate and incurred liabilities which he illegally sought to make a charge on the estate; that at the time of his marriage with Irene, Brown had full knowledge of the contents of the will; that Brown had failed to make any settlement upon his wife or to make other adequate provision for her; that unless restrained he would further waste the estate; and that Irene desired an allowance for the support of (11) herself and her children.

The prayer of the original bill that the Court construe and determine the relative rights of the children George and Francis, and the mother Irene, and her husband in and to the estate, was omitted, and in place of it was the prayer "that the terms and provisions of said will and the duties and obligations imposed, thereunder upon the said A. F. Judd and S. B. Dole as aforesaid, be defined and determined * * * and that the said A. F. Judd and S. B. Dole be reinstated as executors and trustees of said will and estate." The amended bill was signed, A. F. Judd, Sanford B. Dole, with the name of counsel typewritten as before.

To the amended bill Brown answered that he had possession, management and control of the estate "in accordance with the rights and obligations imposed upon him as her (Irene's) husband," and he pleaded that Irene had an estate in fee simple to the lands in controversy; denied the existence of the alleged trust, other than one of guardianship during the minority of Irene; denied that the will made any provision for the children except in the contingency of the death of Irene prior to the death of the testator.

On October 24, 1895, a hearing was had before Circuit Judge Cooper, who resigned his office before reaching a decision, and on April 16, 1896, the matter came up before Judge Perry of the same Circuit, who on the 16th of April, 1896, reserved certain questions for the consideration of the Hawaiian Supreme Court as follows:

1. Was a trust created in the property devised to Irene Li by the will of her father, John Li?
2. If such a trust was created is the trust still in (12) force Irene having married, attained majority, and had issue of such marriage, which issue still survives?
3. If such a trust still exists, is the interest of Irene Li Brown under the same absolute or for life only?
4. If such a trust still exists is it such a trust that the Court will upon the proper motion order an immediate conveyance of the property to Irene Li Brown?
5. Has Irene Li Brown a fee simple title in said property, or is her state one for life only?
6. Was an estate in perpetuity created by said will and if so was its effect to vest the estate absolutely in Irene Brown?
7. If there are any remainders in said property are they vested or contingent and in what person?
8. What legal and adequate estates have the several parties plaintiff and defendant under the will of John Li and the circumstances shown by the pleadings and evidence?

Chief Justice Judd and Justice Frear being disqualified to sit in the case Justice Whiting, the remaining justice of the Supreme Court

requested W. R. Castle and L. A. Thurston, members of the bar, to sit with him in hearing and determining the case. Thurston being compelled to leave the Island's Mr. Paul Neumann, another member of the bar, was substituted in his place and after a hearing wrote the opinion of the Supreme Court.

The Court answered the first question in the affirmative, holding that a trust in the property devised to his daughter was created by the will of the testator; that as to the second question, upon the marriage and attaining majority of the devisee, the trust became extinct; and that as to the fifth question the devisee Irene had an estate in fee simple in the property devised to her by her father's will. It was considered by the Court that it was unnecessary to decide the other questions, in view of the rulings upon the questions (13) answered. No further proceedings appear to have been taken in the case. The case was not remanded to the Circuit Court and no decree was entered in either court.

We come now to the second case where this estate has been a subject of controversy in the Hawaiian Courts.

On the 27th of January, 1903, a bill in equity to declare a trust and for relief was filed in the same Circuit Court by A. F. Judd, as next friend of George and Francis, minors, against C. A. Brown, John A. Magoon, and Irene. The bill, after alleging the death of John II on the 2d day of May, 1870, possessed of an estate in fee of certain lands and personal property, alleged that he left a last will and testament which was admitted to probate on the 10th day of June, 1870; that the said will directed that if Irene should die, having borne children, the property should descend to her children, but that she should be the first heir, meaning and intending thereby that, during her life she should have the use and benefit of the said property, and that her children, by virtue of the will, were the absolute owners in fee of the same, subject only to their mother's life estate; alleged the marriage of Irene to Charles A. Brown, and the proceedings in Court hereinbefore referred to relating to the estate of John II, deceased; the execution of a deed of conveyance on July 2, 1897 by Irene and Charles A. Brown of the said property in trust for the organization of a corporation to hold the same and to deliver one-third of the shares thereof to Irene, one-third to Brown, and a third to plaintiffs, which corporation was organized under the name of The John II Estate, Limited, and delivery of shares made accordingly, except that one share of those to be issued to Brown was caused by him to be issued in the name of J. A. Magoon, one of the defendants thereto. It is alleged that the defendants held such shares subject to a trust that upon (14) Irene's death the same should be assigned to plaintiffs. It is alleged that on the 27th day of May, 1898 the said Irene was granted an absolute divorce from the defendant Charles A. Brown. The bill recites the proceedings in the first case, but alleges, among other things, that no decree had been made or entered in that case; that in none of the proceedings in that case, although plaintiffs had interests conflicting with their mother, did they have separate counsel; that the same attorneys represented them and also their mother; that there had been no legal adjudication of the questions

involved; that no Court organized as required by the Constitution of the Republic of Hawaii had obtained appellate jurisdiction of any of the reserved questions in that case; that the jurisdiction of the Supreme Court concerning the construction of said will (if it ever existed) ended upon its determining that no trust was in existence concerning said property; that there was no statutory or other authority to reserve questions of law in said cause for the Supreme Court and that the Supreme Court had no jurisdiction of said cause. The bill prayed, among other things, for an order restraining the defendants from selling, pledging, or otherwise disposing of the shares held by them as aforesaid, and that they be decreed to assign the shares held by them to a trustee in trust during the life of Irene, to pay the income thereof to those entitled thereto and at her death to assign all of the said shares to the plaintiffs absolutely, and for general relief.

To this bill Irene Holloway answered admitting the material allegations of the bill except the allegation that the said John Ii meant and intended by his said last will that the defendant Irene should have the use and benefit of said (15) property during her lifetime only, and she alleged that she was given in and by said will the said property in fee simple. The defendant Magoon demurred to the bill generally. The defendant Brown demurred on general and special grounds, among others, on the ground that there was another suit pending in which all necessary proceedings had been taken save alone the formal entry of a decree, and that it did not appear that any of the property of estate of the plaintiffs was conveyed to said corporation either by Irene or C. A. Brown, or by any persons purporting to act in their behalf. The demurrers were sustained on the ground that the deed of conveyance referred to, which was made a part of the bill, did not convey or purport to convey the estate of the plaintiffs in the property.

The plaintiffs thereupon amended their bill by adding averments of intention on the part of the grantors of the said deed of conveyance to convey to trustee for the organization of a corporation the fee simple of the lands devised by the will to the plaintiffs, and that the ownership in fee simple in such lands was claimed and exercised by the corporation by virtue thereof; that the defendants claimed that the proceedings and decision of the Supreme Court were conclusive upon the plaintiffs and forever barred them from setting up any title under the will to the lands, and that by reason of the decision of the Supreme Court, they have been deprived of trustees as provided by the will for the protection of their interests as remaindermen, and that unless the invalidity of said proceedings and decisions, and also the plaintiff's titles therein claimed, be declared by the court, a cloud will rest upon their title, and their rights as such remaindermen may be subject to costly and difficult litigation (16). The prayer of the amended bill was for such other, further and appropriate relief, orders and decrees as the nature of the case may require, and specifically, that a declaratory decree be made declaring that the proceedings, decision and conveyance herein mentioned are valid and of no effect as against the plaintiffs.

The bill as amended was answered by Irene Holloway and demurred to by Magoon and Brown on substantially the same grounds as before, and the demurrers were sustained; the Court holding that the new allegations did not take the case out of the rules set out in the former decision unless the bill was good as a bill *quia timet*; that, it being apparent from the pleadings that the plaintiffs were not in possession of the land, they had their remedy in the statutory action to quiet title. A decree was made dismissing the bill and giving costs to the defendants.

The plaintiffs appealed to the Supreme Court where the decree was affirmed and the case remanded to the Circuit Judge.

On the trial of the present case in the court below the proceedings in these two cases in the courts of Hawaii were introduced in evidence and constituted substantially an agreed statement of facts upon which the court was called upon to determine the rights of the claimants to the fund in Court.

In passing upon the questions involved the Court rendered an elaborate opinion upon the terms of the will, the character of the devise and rule of property, and the effect of the proceedings in the Courts of Hawaii upon the distribution of the estate in controversy, and thereupon it entered its judgment and decree that the land condemned was owned in fee simple by one John II; that said land was devised by the last will (17) and testament of said John II to his daughter Irene II for her life, remainder in fee to her children; that said Irene II married C. A. Brown and had three children born to her namely, George II Brown, Francis Hyde II Brown, and Bernice II Brown, that said Bernice II Brown died in infancy; that said Irene II Brown and C. A. Brown thereupon inherited all of the property of said Bernice II Brown; that Irene II Brown and C. A. Brown thereafter conveyed all their interests in said land to said John II Estate, Limited; that said Irene II Brown and C. A. Brown were thereafter divorced and said Irene II Brown thereafter married C. S. Holloway; that said John II Estate, Limited, is entitled during the life of said Irene II Holloway to the net annual income from said sum of ten thousand dollars; that after the death of said Irene II Holloway said sum of ten thousand dollars belongs absolutely in equal shares to said George II Brown, his heirs or assigns, and Francis Hyde II Brown, his heirs or assigns, said John II Estate, Limited, as the assignee of the heirs of said Bernice II Brown and any other child or children that may hereafter be born to said Irene II Holloway.

From this decree the present appeal has been prosecuted.

Ruben D. Silliman, Thomas G. Crothers, George E. Crothers, and Philip L. Weaver, for Plaintiffs in Error.

Choate & Larocque and John Alfred Magoon, of counsel. A. A. Wilder, F. E. Thompson and E. M. Watson, for Defendants in Error.

Before Gilbert, Ross and Morrow, Circuit Judges (18).

MORROW, *Circuit Judge* (after stating the facts as above) delivered the opinion of the Court:

The plaintiff in error, the John Ii Estate, Limited claims the whole fund in court: (1) By deed through Irene who was the daughter of John Ii, deceased, and was named as a devisee in her father's will, and who, claiming an estate in fee simple under the will, deeded the lands condemned to the John Ii Estate, Limited; (2) By prior adjudication in the Hawaiian courts.

The defendants in error, Francis and George, children of Irene, denying the fee simple estate of their mother, and admitting only a life estate in her, claim an interest in the fund by way of remainder under the will of John Ii deceased.

The court below held that the devise to Irene was for life; that the children had an interest in the fund as claimed by them, and that there had been no adjudication in the courts of Hawaii foreclosing that interest. The court entered judgment accordingly. Was the court in error in entering this judgment?

The primary question is whether the devise to Irene was in fee simple or for life. To determine this question it will be necessary to carefully examine the provisions of the will of John Ii. The original of this will is in the Hawaiian language, and for convenience the material parts as translated and agreed to by the parties will be restated. The controversy as to the intention of the testator with respect to the devise made to his daughter Irene turns upon the construction of the clauses and paragraphs in the will which for the purpose of easy reference are placed in italics and one clause where the agreed translation is in dispute is (19) placed in small caps.

"All my property, both real and personal shall descend to my heirs who are mentioned below, as follows:

"First: Irene Haalou Ii, my own daughter, is the first heir as follows: (Here follows a description of certain lands, including the land condemned in this case); and one-half of all my personal property.

"Second: My wife, Maraia Ii, is my second heir (Here follows a description of certain lands), and one-half of all my personal property; and in case my wife marries again this land shall descend to my daughter; she cannot bequeath to any one.

"Third: My brother, J. Komoikehuehu, is the third heir (Here follows a description of certain lands); those are the lands I bequeath to him.

"Fourth: My interest in the land of G. Naaihelu, my deceased younger brother, is for his widow Kamealani.

"Fifth: My land (Here follows a description of certain lands) is for A. F. Judd, and that is his land that I bequeath to him.

"By this will I have appointed and I do hereby appoint J. Komoikehuehu, A. F. Judd, they both to be the executors and guardians of the person and property of my daughter, the first devisee mentioned in this will.

"All the income from the lands that are leased, and all other receipts from all the lands of my daughter, *they two alone shall have the sole care of it until she becomes of age or has CHILDREN OF HER OWN; they shall be the executors during the lifetime of my daughter and her children in accordance with my wishes as expressed in this will,* and they shall receive compensation the same as provided by law * * * and the first fruits received from the lands of my (20) daughter, that is, the money received, there shall be taken therefrom ten cents from each dollar which is set apart as an offering to God's Kingdom, the same as I have done. And my executors are to carry out this request of mine.

"And further, if my daughter should die having borne children, then the property shall descend to her children, and if she should die without having had any children the property shall descend to her own mother, and if she should be dead then the property shall descend to my brother, J. Komoikehuehu."

This will is dated the 28th day of April, 1870. The testator died on the 2d day of May, 1870. The daughter Irene was then aged about nine months.

The disputed clause in the will is indicated by the words in small caps in the paragraph reading as follows:

"All the income from the lands that are leased and all other receipts from all the lands of my daughter, they two alone shall have the sole care of it until she becomes of age *or has children of her own*: they shall be the executors during the lifetime of my daughter and her children in accordance with my wishes as expressed in this will."

These words, "or has children of her own," had been translated from the original words, "a hanau paha kana mau keiki." Judge Dole, presiding in the court below, who is himself familiar with the Hawaiian language, did not consider himself bound by the agreed translation of these words, and with the consent of counsel on both sides heard the testimony of a number of experts in the Hawaiian language as to the meaning of these words, and while several of the experts approved the translation, "*or has children of her own*," two of these experts, who appear to have had superior knowledge of the Hawaiian language and its construction, translated the (21) words into English as follows: "*And in the event of her giving birth to children*:" and a majority of the experts admitted that the words in the relation in which they stood in the paragraphs were capable of such translation, and such a translation was required to make the clause harmonize with the remaining clauses of the paragraph. Judge Dole accordingly found that with the translation, "*And in the event of her giving birth to children*," the repugnance and inconsistency in the terms of this clause taken in connection with the preceding and succeeding clauses of the paragraph were removed and the whole paragraph made to harmonize with the obvious and untechnical meaning of the final provision of the will. This translation was therefore accepted. The whole paragraph with this new translation reads as follows:

"All the income from the lands that are leased and all other re-

ceipts from all the lands of my daughter, they two alone shall have the sole care of it until she becomes of age, and in the event of her giving birth to children they shall be the executors during the lifetime of my daughter and her children in accordance with my wishes expressed in this will."

The final provision of the will referred to by Judge Dole is as follows:

"And further if my daughter should die having borne children, then the property shall descend to her children."

The original translation rendered the whole paragraph contradictory in terms and inconsistent in purpose. By its terms the testator appointed two executors to have the sole care of the income from the lands devised to the daughter until she should become of age, or alternately until she had children of her own. Then it would follow as a legal consequence that their care of the estate of the daughter would (22) cease, but this was not the intention of the testator for he immediately proceeded to provide otherwise, and in the very next clause he provided that the executors should be the executors during the lifetime of his daughter and also of her children. It will not be presumed that the testator contemplated or proposed such a contradictory situation in the care and control of his daughter's estate, and this apparent repugnance and inconsistency should be avoided if it can be done with due regard to the proper construction of the language contained in the will. This repugnance and inconsistency is avoided by a translation which appears to be not only admissible, but perfectly reasonable, and wholly consistent with the other language of the will and the plain purpose and intent of the testator.

In view of the fact that the Judge of the court below is himself an Hawaiian scholar; that he heard the expert witnesses and was able to judge of their knowledge and skill as experts in the use of the Hawaiian language, we shall accept the translation of the clause in question adopted by the court below as the correct translation and as expressing the true purpose and intent of the testator.

We come now to the question: What estate in the land condemned in this case did the testator devise to Irene?

Plainly if we are to be guided by the provisions of the will we have been considering, it was a life estate; that is to say, she was to have the income from the lands mentioned in the will during her lifetime, and if she had children then the property should descend to her children and if she should die without having had any children then the property should descend to her own mother, and if she should be dead then the property should descend to the testator's brother. This is the positive direction of the last (23) clause of the will. Now, while the writer of this will had evidently but little technical skill in the construction of its provisions, it is clear that the instrument was intended to provide for the devise of a life estate to Irene and not an estate in fee simple. But the plaintiff in error contends that this construction of the will is inadmissible; that the devise to Irene as the "first Heir" was a gift in fee under the Hawaiian law, and that when a fee is once given it cannot be taken away except by language that shows an unmistakable intention on the

part of the testator so to do. It may be conceded that if there had been in the first part of the will a clear, certain and definite devise to Irene of an absolute estate in fee simple it could not afterwards be taken away from her in the same instrument except by language showing in at least as clear and unmistakable terms the intention of the testator so to do; but has the testator in the first part of this will granted to Irene an estate in fee simple in such clear, certain and definite terms as to override the subsequent provisions describing a life estate? We think not. The first mention of a devise to Irene is plainly uncertain and indefinite as to the character of the estate devised to her, and it is only by reference to the subsequent provisions of the will that we find the estate described in such clear and definite terms that we can understand its character and quality. The designation of Irene as the "first heir" does not necessarily mean that the devise to her is of an estate in fee simple, and it is evident that the testator did not intend that his will should be so understood. The first declaration is, "all my property both real and personal shall descend to my heirs who are mentioned below." The word "heirs" as here used is manifestly without legal significance in describing the estate devised. This is (24) apparent from the terms of the other devises. The testator's wife is designated as his "second heir," but she is clearly not given an estate in fee simple in land, since the estate is specifically limited by the provision, "in case my wife marries again the land shall descend to my daughter, she cannot bequeath to anyone." On the other hand, while A. F. Judd is not designated in the body of the will as an "heir" he is plainly given land in absolute fee simple in the provision, "My land (describing it) is for A. F. Judd, and that is the land I bequeath to him." Moreover, as pointed out by the court below, the original Hawaiian word "hooilina," which is translated "heir" in the first, second and third bequests, is translated "devisee" in the clause appointing the executors and guardians of the daughter, who is referred to as the first "devisee mentioned in the will," thus making the word "heir" and "devisee" in the translation synonymous. The word "heir" could not therefore have been intended as descriptive of the estate devised but of the person to whom the devise was made, and being thus indefinite and uncertain as to the estate devised resort must be had to other portions of the will to ascertain the intention of the testator. The plaintiff in error cites the late case of *Simerson v. Simerson*, 20 Haw. 57, as declaring a rule of construction applicable to this case. In that case the grant was by deed and the granting clause was as follows: "I do make and by this give, sell and convey absolutely unto Mary Nanea Simerson aforesaid, and her heirs forever that certain piece of land," etc. In a subsequent paragraph in the deed it was provided: "This conveyance is under the conditions mentioned below, viz:

"One. That Mary Nanea Simerson aforesaid cannot sell this land nor mortgage it;

"Two. She is to pay the mortgage existing upon the (25) said land, and all expenses pertaining to the release of said mortgage.

"To have and to hold the said piece of land, with all rights and

benefits thereon, to Mary Nanca Simerson aforesaid immediately after our death;

"And after her death, the said land is to descend to her child now being * * * and other children which she may have hereafter, and to their heirs and assigns forever."

Here is a deed conveying land absolutely to the grantee and her heirs forever in the common law form of a grant in fee simple. There is nothing uncertain or indefinite about the estate granted. On the contrary it is perfectly certain, clear and definite as the grant of an absolute fee simple title, and if subsequent conditions in the deed are found in conflict with this grant the latter must yield to the former, but the court found that the last condition in the original Hawaiian language was not so much in conflict with the absolute grant as appeared by the English translation. The court referring to the original deed and to the last condition in the deed said:

"This is not a remainder but an expression of the grantor's wish or intention that the inheritance which he had given to his daughter should descend from her to his grandchildren. There is no Hawaiian word which is the exact equivalent of 'condition,' the word 'kumu,' translated 'conditions,' used in the version, meaning 'grounds' or 'considerations.' Moreover, the Hawaiian language does not distinguish between the imperative mood and the future tense. The deed then would readily mean to the Hawaiian mind that the grantor gives the land to his daughter absolutely and to her heirs and assigns forever, considering that she will (or shall) not sell or mortgage it and will pay off its mortgage and (25) that at her death it will (or shall) descend to her children."

What the court did in this case was what the court below did in the present case; it gave a critical examination to the translation of important words, and then, looking at the whole instrument without reference to formal divisions, ascertained the intention of the testator, following a rule in cases cited by the court in *Bodine's Administrators v. Arthur*, 91 Ky. 53; *Beecher v. Hicks*, 75 Tenn. 207; *Fogarty v. Stack*, 86 Tenn. 610; *Horn v. Broyles* (Tenn.) 62 S. W. 297; *Prior v. Quackenbush*, 29 Ind. 475; *Clapp v. Byrnes*, 3 App. Div. (38 N. Y. Suppl. 1063); *Barnett v. Barnett*, 104 Cal. 298; *Flagg v. Eames*, 40 Vt. 13; *Rines v. Manfield*, 96 Mo. 394. This was the rule followed by the court below in the present case, and is the generally accepted rule in this country and has been followed in the Hawaiian courts. It is a fundamental rule in the construction of wills that, if possible, effect be given to every word and every clause in a will, and the several clauses should be made to harmonize with the general intent of the testator as it may be gathered from a consideration of the whole instrument. *Zupplein v. Austin*, 6 Haw. 8, 10; *Paaluhī v. Keliiahaleole*, 11 Haw. 101, 103; *Fitchie v. Brown*, 18 Haw. 52, 71, 30 Am. & Eng. Ency. 644. The first and great rule in the exposition of wills to which all other rules must bend is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law. *Smith v. Bell*, 6 Pet. 68; *Adams v. Cowen*, 177 U. S. 471, 475; *Anderson v. Messinger*, 146 Fed. 929, 938, 30 Am. & Eng. Ency. 661.

In *King v. King*, 215 Ill. 100, 110, the question in the construction of a will was almost identical with the question under consideration. The court said: (27)

"If an estate is devised to a person without the use of such words of inheritance, the devisee will take in fee simple, unless a less estate is limited by express words in a subsequent part of the will, or by construction or operation of law. (Citing cases.) The question then arises whether the fee-simple estate thus devised to the plaintiff in error was reduced to an estate less than a fee by any of the clauses of the will following and subsequent to the first clause. * * *

"By the use of the words, 'And in case of the death of daughter, and she left one or more children, then the property goes to them when of age,' it was clearly the intention of the testator that the daughter, the present plaintiff in error, should have the life estate only in the property, and that the remainder, after the expiration of the life estate, should go to her children."

Under this rule supported by numerous authorities in addition to those cited, we are of the opinion that the terms of the will in this case show that it was the intention of the testator to devise the land in question to his daughter Irene for life with the remainder in fee to her children.

It is next contended by the plaintiff in error that this controversy is *res judicata*; that in two prior Hawaiian cases, *Brown v. Brown*, 11 Haw. 47, and *Brown v. Brown*, 15 Haw. 308, the question involved in this case was litigated and determined adversely to the defendants in error.

The first case was a suit in equity brought in the Circuit Court of the First Circuit of the Republic of Hawaii in 1894 by Irene Haalou II Brown, a married woman, and George II Brown and Francis Hyde Brown, minors, by their next friend A. D. Judd and A. F. Judd, against Charles Brown to declare and execute a trust and for an accounting. (28)

The bill was signed by "A. F. Judd," and in the margin were typewritten the names of "Carter & Carter" and "W. A. Kinney" as attorneys for plaintiffs. The suit had its origin in this situation. In the will of John II, A. F. Judd and J. Komoikehuehu were named as executors and guardians of the person and property of the daughter Irene. John II died in 1870 leaving a large estate and the daughter surviving. The will was admitted to probate and Judd and Komoikehuehu appointed executors of the will and guardians of Irene. In 1875 Komoikehuehu resigned and Sanford B. Dole was appointed in his place, and thereafter performed their duties under the will until 1886, when Irene married C. A. Brown. Thereupon Judd and Dole applied to the court to be discharged as guardians on the ground that their powers as guardians of Irene had ceased upon her marriage to Brown. They were, however, never discharged as executors of the will. When Judd was appointed executor and guardian he received from the court what purported to be a true and correct copy of the will upon which he states he exclusively relied in determining his powers and duties. In the copy of the

will furnished Judd the following words in the Hawaiian language were omitted: "O laua no na hooko kauoha i ka wa e ola ana kuu kaihamahe, a i kana mau keiki." These words are translated: "They shall be the executors during the lifetime of my daughter and her children." By the omission of these words it is alleged that Judd and Dole were not fully advised of the true nature and intent of the will and supposed that no trust was created by the will that would not terminate when Irene reached her majority or was married. Learning of this omission and believing that the original will created a trust during the lifetime of Irene and her children, Judd as sole surviving trustee brought the first (29) suit against Brown in 1894 for the purpose of submitting the construction of the will to the adjudication of the court. The suit was brought against Brown because it was alleged he had secured possession of the property and claimed the right to all of its rents, issues and profits, and its exclusive control and management. The bill included a prayer that the court construe and determine the relative rights of Irene and her children and her husband in and to said estate under the will. The defendant Brown did not plead to the bill, but appeared specially for the purpose of asking the court to dismiss the bill on the ground that the plaintiff Irene had filed her discontinuance of the suit. The bill appears not to have been satisfactory to Irene, for she asked leave of the court to discontinue all proceedings in the cause. After some controversy an amended bill was substituted for the original bill on August 10, 1894, when the same parties plaintiff and defendant, except that Sanford B. Dole was joined as an additional party plaintiff, and the prayer of the original bill that the court construe and determine the relative rights of the children George and Francis and the mother Irene and her husband, and the defendant Brown in and to the estate, were omitted and in place of it was the prayer that the terms and provisions of said will and the duties and obligations imposed thereunder upon the said A. F. Judd and S. B. Dole be defined and determined. The answer of Brown in substance denied the trust other than guardianship during the minority of Irene. After proceedings before the Circuit Court of the Hawaiian Islands, Judge Perry who at the time was Judge of the court reserved certain questions for the consideration of the Hawaiian Supreme Court. These questions have been set forth in the statement of facts and need not be restated. (30). In brief they included the question at issue under the amended bill, that is to say, whether a trust was created by the will of John Li in the property devised to his daughter Irene, and if such a trust was created, was the trust still in force, Irene having married and had issue of the marriage which still survived? The questions also included in different forms of statement the question contained in the original bill and which had been omitted from the amended bill, that is to say, what were the relative rights and interests of the parties plaintiff and defendant in the estate of John Li under his will?

It is objected that there was no authority for the reservation of these questions for the consideration of the Supreme Court, but assuming that there was such authority they were not reserved in

the manner provided by law. The statute of Hawaii under which the Judge assumed to act provides:

"Whenever any question of law shall arise in any trial or other proceeding before a Circuit Court the presiding Judge may reserve the same for the consideration of the Supreme Court." Laws of 1892, ch. 57, sec. 72.

The authority to reserve questions for the consideration of the Supreme Court is limited by this statute to questions of law. It appears from the pleadings in the case that the only question that had arisen in the case and which it was proposed to submit to the Supreme Court was a question of fact. The question was what was the intention of the testator with respect to the trust he had created in the property he had devised to his daughter Irene? The answer to this question was to be found not in the determination of a question of law, but from an inspection of the original will ascertain whether the words alleged to have been omitted from the copy of the will furnished the guardian Judd were (31) in fact contained in the original will. It was then the duty of the court to construe the whole will etymologically and grammatically for the purpose of ascertaining the true intent and purpose of the testator in creating a trust for his daughter's estate. This was a question of fact, which being found, enabled the court to define and determine the duties and obligations imposed thereunder upon the trustees Judd and Dole. There was no statute providing for the reservation of such a question and in our opinion the court had no jurisdiction to reserve such a question for the consideration of the Supreme Court.

The next objection was that the questions were not reserved in the manner provided by law turns upon the authority of the Judge of the Circuit Court to reserve questions in chambers as was done in this case. Under Section 72 of the Laws of 1892, *supra*, the presiding Judge of the Circuit Court is authorized to reserve questions of law for the consideration of the Supreme Court. The questions were reserved by the presiding Judge of the Circuit Court and had they been questions of law instead of questions of fact, we would have had no hesitation in holding that the Judge had jurisdiction to reserve such questions for the consideration of the Supreme Court. The dictum of the Supreme Court in *Booth v. Baker*, 10 Haw. 543, 546, that there is no authority statutory or otherwise for the reservation of questions to that court by a Circuit Judge sitting in equity at chambers, is not sufficient in our opinion to justify this court in holding that the Judge had no authority to reserve questions in chambers for the consideration of the Supreme Court if they were otherwise within the jurisdiction of the court for such action.

The next objection relates to the question whether the (32) Supreme Court was legally constituted for the hearing and determination of the case.

The Supreme Court of Hawaii under the Constitution of the Republic adopted in 1894 consisted of a Chief Justice and two Associate Justices. When these questions reached the Supreme Court it was found that the Chief Justice and one of the Associate Justices were disqualified to sit in the case. The law at that time provided that if

any justice of the Supreme Court should be disqualified from sitting in any cause pending before the Supreme Court his place for the trial and determination of such cause should be filled by one of the Circuit Judges who had no connection with said cause either as counsel or in his official capacity, or by any competent and disinterested member of the bar of the Supreme Court thereunto authorized by the written request of the remaining Justices. In this case two of the Justices being disqualified the remaining Justice requested two members of the bar to sit with him in hearing and determining the case. The question was then argued and submitted, but one of the members of the bar who had been requested to sit in the case being compelled to leave the Islands another member of the bar was substituted in his place. An opinion answering the reserved questions was written by this last substituted member, was signed by the other members of the court and filed, but no further proceedings taken in the case.

It is strenuously objected that this was not a legally constituted court; that at the time the reserved questions were certified to the Supreme Court the law provided for the filling of one vacancy only for the hearing of a cause and that the addition of a second substituted member was in violation of the statute.

The court below did not deem it necessary to pass upon (33) this question in view of its position on the question as to the authority of the court to reserve the questions it did for the consideration of the Supreme Court. For the same reason we do not deem it necessary for this court to pass upon this question.

The next objection is that the defendants in error were not represented by counsel in the case.

In the original bill the plaintiffs were Irene, the mother, the two children represented by A. F. Judd, their next friend, and A. F. Judd. The bill was signed and verified by "A. F. Judd." The names of "Carter & Carter" and "W. A. Kinney" were appended typewritten as "attorneys for plaintiffs."

In the amended bill Sanford B. Dole was added as one of the plaintiffs. The bill was signed by "A. F. Judd" and "Sanford B. Dole," and was verified by "A. F. Judd." The name of "W. A. Kinney" was appended typewritten as attorney for plaintiffs. Subsequently Carter & Carter appeared with W. A. Kinney as attorneys for plaintiffs in the case. Strictly speaking the original bill was that of A. F. Judd and the amended bill that of A. F. Judd and Sanford B. Dole, but passing that objection, there was but one set of attorneys for all the plaintiffs named in each of the bills, and there was but one defendant. Were the interests of all the plaintiffs named in the bills in such accord as against the defendant that they could be represented by the same attorneys?

In the original bill the prayer was that Judd *by* reinstated as trustee; his duties and obligations defined and determined, and the relative rights of Irene and her children and her husband under the will determined. It may be assumed that the interest of all the plaintiffs were in accord with respect to the first two clauses of the prayer of the bill, but (34) it cannot be assumed that they were in accord with

respect to the last clause. The relative rights of Irene under the will were manifestly in conflict with those of her children. This bill was not satisfactory to Irene and she asked that proceedings under it should be discontinued and the bill dismissed. The reason for such dissatisfaction is not disclosed in the record, unless it is found in the differences in the frame work and prayers of the original as compared with the amended bill.

In the amended bill the prayer is that Judd and Dole be reinstated as executors and trustees of the will and estate and that their duties and obligations under the will be defined and determined. The prayer of the original bill that the relative rights of Irene and her children and her husband be determined was omitted from the amended bill. As thus presented to the court it might be assumed that the interests of all the plaintiffs were in accord and that they could be represented by the same attorneys, but when the Circuit Judge by consent of counsel returned to the prayer of the original bill and brought forward the question omitted from the amended bill as to the relative rights and interests of Irene and her children as between themselves in the estate of John II, deceased, and incorporated this question in different forms in the statement of reserved questions for the consideration of the Supreme Court, the case assumed an aspect in which the interests of the children were distinctly in conflict with the interests of their mother. And when the Supreme Court undertook to decide, as it did, in answer to the reserved questions, that Irene had an estate in fee simple in the property devised to her in her father's will and that there was no vested or contingent remainder in that estate for Irene's children, the court assumed to determine a controversy between (35) those two parties where such conflicting interests had been represented by the same counsel. As this determination was against the interests of the children, we must hold that they were not represented by counsel and for that reason the court never had jurisdiction over their interests in the estate.

But it may be said that the court could not determine the duties and obligations of the executors during the lifetime of Irene without ascertaining what her estate was under the will. If this is true and we are inclined to think it is, it determines conclusively that in whatever aspect we view the case the children were entitled to be represented by counsel, and not having been so represented they have not had their day in court and the case is in no sense binding upon them.

The next objection to the case is we think final and conclusive, and entirely eliminates the first case from the controversy as a judgment and as the basis of a judgment in the second case to which we will refer presently. The objection is that after the opinion was filed in the Supreme Court answering the reserved questions no further proceedings were taken in the case. The answers to the questions were not returned to the court below and no directions given to that court as to further proceedings and no decree has been entered in either court in the case. The case is still pending undetermined in the Circuit Court without force or binding effect upon the defendants in error. In the absence of a decree the decision of the court is not

binding. *Oklahoma v. McMaster*, 196 U. S. 529, 533; *Bouldin v. Phelps*, 30 Fed. 547, 578; *Springer v. Bien*, 128 N. Y. 99; *Detroit v. R. R.*, 134 Mich. 11; *Wilson v. Hubbard*, 39 Wash. 671; *Hart v. Brierley*, 189 Mass. 598, 604; *Chicago v. Goodwillie*, (36) 208 Ill. 252; *Child v. Morgan*, 51 Minn. 116, 121.

Our conclusion with respect to the first case is that neither the Circuit or the Supreme Court of Hawaii had jurisdiction over the defendants in error or the subject matter in controversy so far as the same related to or affected their interests in the estate and that there has been no adjudication with respect to the same.

We come now to the second case. That was a suit in equity brought on the 27th day of January, 1903, in the Circuit Court of Hawaii by A. F. Judd as next friend of George and Francis, minors, against C. A. Brown, John A. Magoon and Irene Holloway to declare a trust and for relief. In effect it was a suit on the part of Irene's children to establish their rights as remaindermen in the estate of John II which the theory was had not been determined in the first case. The particulars relating to the will and estate of John II and the devises mentioned in said will were set forth in the bill as in the first case, together with an allegation that the devise to Irene was intended and meant for life; that her children (the plaintiffs) were the absolute owners in fee of said property subject only to the mother's life interest. The previous litigation is referred to and the proceedings in the first case in the Circuit and Supreme Court of Hawaii are recited, but it is alleged that the Supreme Court was without jurisdiction to determine the rights of the plaintiffs in that case, alleging the particulars in which such jurisdiction was lacking, and that no decree was entered in the case. The bill prayed among other things for an order restraining the defendants from selling, pledging or otherwise disposing of certain shares of stock held by them in the John II Estate, Limited, and that they be decreed to assign the shares held by them to a (37) trustee in trust during the life of Irene to pay the income thereof to those entitled thereto and at her death to assign all of the said shares to the plaintiffs absolutely.

To this bill Irene Holloway answered admitting the several allegations of the bill except the allegation that the said John II meant and intended by his said last will that the defendant should have the use and benefit of said property during her lifetime only, and she alleged that by the will she was given the property in fee simple. The defendants, Brown and Magoon, demurred, the former on general and special grounds, among others, on the ground that there was another suit pending, referring to the first case, and alleging that all necessary proceedings had been taken save alone the formal entry of a decree, and that it did not appear that any of the property or estate of the plaintiffs had been conveyed to said corporation either by the plaintiffs or any person purporting to act in their behalf. The court sustained the demurrer on the ground that the deed of conveyance referred to in the bill did not convey or purport to convey the estate of the plaintiffs in the property conveyed. A decree was accordingly entered dismissing the bill but allowing plaintiffs leave to amend. The bill was thereupon amended by the addition of a

paragraph to the bill alleging that it was the intention and the declaration of the grantors in said deed of conveyance to convey to trustees for the organization of a corporation the fee simple of the lands devised by the will to the plaintiffs, and that the ownership in fee simple in such lands was claimed and exercised by the corporation under and by virtue of said conveyance; that it was claimed by the defendants that the proceedings and decision of the Supreme Court in the first case were conclusive upon the plaintiffs and forever barred them from (38) setting up any title under said will to the lands mentioned in the will; that in consequence of said decision of the Supreme Court the plaintiffs had been deprived of trustees as provided by said will whose duty it would have been to preserve the plaintiffs' rights as remaindermen in said land and to see to it that no waste was committed upon the same or other injury done thereto to plaintiffs' detriment as remaindermen and otherwise protect the plaintiffs' interests in the premises; that unless the invalidity of the proceedings and the decision of the court, and also the plaintiffs' title to the property be declared by the court, a cloud would rest upon the plaintiffs' title and their rights in said land as such remaindermen might be made subject to costly and difficult litigation.

A paragraph was also added to the prayer of the bill that a declaratory decree be made declaring that the proceedings, decision and conveyances mentioned were invalid and of no effect as against the plaintiffs.

The bill as amended was demurred to by the defendants Brown and Magoon on substantially the same grounds as before. The court sustained the demurrer in a written opinion in which the court said:

"The allegations in the amendment do not take the case out of the rules set out in the former decision rendered in this case upon demurrer to the original bill, unless the bill is now good as a bill *quia timet*.

"It has been held that the equity action of *quia timet* still lies, and that the jurisdiction of this action in equity has not been taken away by the statutory action to quiet title. * * *

"But plaintiffs are not in possession of the land in question; at least it is not so alleged in the bill, and (39) the allegation of the amendment as to the possibility of waste being committed would lead the Court to infer that plaintiffs are out of, and the defendants or their grantees, in possession of the land.

"The demurrer should have been sustained, as it was, because the bill did not show that plaintiff *was* in possession." Citing the case of *Ahmi v. Ashford*, 2 Haw. 13. A decree was thereupon entered dismissing the bill. From the decree the plaintiffs appealed to the Supreme Court where the decree of the Circuit Court was affirmed. The Supreme Court agreed with the Circuit Judge that the bill was not maintainable on the ground that it was immaterial whether Irene took only a life estate or an estate in fee simple, inasmuch as she and her then husband purported in their deed to convey only the lands belonging to them and their right, title and interest by curtesy dower or otherwise in the lands of each other, and did not attempt to

convey any lands belonging to their children, the plaintiffs, even if the latter had the remainder in fee in the lands in question.

The Supreme Court also concurred in the opinion of the Circuit Judge with respect to the bill as amended holding that the amendments to the bill did not alter the result in so far as the bill might be considered to declare a trust. And considered as a bill to remove a cloud the Supreme Court agreed with the Circuit Judge that the court could not declare invalid as against a remainderman conveyances that on their face purported to convey the unquestioned interest, and only the interests, of the life tenants.

The court then proceeded to consider whether the suit could be maintained to remove a cloud by reason of the prior decisions. The court held with respect to the constitution of the court that the decision in the first case was (40) by a *de facto* court, and that a decision of a *de facto* court was not void and could not be questioned collaterally; that granting that the Supreme Court did not have jurisdiction of reserved questions in equity, still it was not such a defect as rendered the decision absolutely void and with respect to the jurisdiction of the court to construe the will after deciding that this was no longer a trust in existence the court held that the Circuit Court should have declined to construe the will after it had decided that there was no trust. "Still," says the Court, "the decision would not be wholly void. * * * If the decision was erroneous in these respects, it was mainly because there was an adequate remedy at law. But that was a matter that could be waived. * * * And this as well as the other alleged defects above-mentioned could be waived on behalf of the plaintiffs, notwithstanding they are minors, at least, so as to preclude a collateral attack by the minors." The decree of the Circuit Court was accordingly affirmed.

The fact that no decree was entered in the first case was not mentioned by the Supreme Court in the second case, and the effect of the absence of a decree in the first case was therefore a question, and as we view it, an important question, not passed upon or in any way adjudicated in the second case.

What the Supreme Court did in the second case was to affirm the decree of the Circuit Court. That decree had been entered upon the specific grounds set forth in the decree referring to the "decision in writing herein sustaining the demurrers of the defendants." The decision in writing to which reference was made sustained the demurrers to the bill of complaint on the ground already stated, that the bill did not state a case entitling the plaintiffs (41) to relief in equity.

(1) Because the deed of conveyance executed by Irene and her husband referred to in the bill of complaint did not purport to convey lands belonging to the plaintiffs; and

(2) The bill did not show that plaintiffs were in possession of the land in controversy.

These objections went only to the frame-work of the bill under certain well-known rules of procedure and not to the merits of the case. A more imperative rule requires that the merits of a case shall not be sacrificed to formal defects in practice or pleadings, and

hence it is that such a decision is limited to the actual questions involved.

Where a decree refers to the "opinion of the trial judge in terms that make it clear that the object was to refer to it, to explain what was determined, and the reasons therefor, then such opinion becomes legitimately a part of the record, and must be looked to, to explain what was in issue, and what was determined by the judgment or decree in question." *Legrand v. Rickey's Adm'r*, 3 S. E. 864, 871. It follows from the rule that the opinion of the Appellate Court affirming such a decree is inadmissible to show that the question determined by the trial court was different from that embraced in its decision. *Robinson v. N. Y. Co.*, 18 N. Y. Sup. 728, 730; *Penouilli v. Abraham, et al.*, 9 So. 33; *Ohio River R. Co. v. Fisher*, 115 Fed. 929, 935; *Russell v. Russell*, 134 Fed. 840, 841.

Where a demurrer is sustained for want of equity, "the estoppel extends only to the precise point presented by the pleadings and decided by the ruling upon the demurrer." *Dennison Mfg. Co. v. Scharf Tag, Label & Box Co.*, 121 Fed. 313, 318; *Wiggins Ferry Co. v. Ohio & Miss. Ry. Co.*, 142 U. S. 396, 410. A decree sustaining a demurrer is no bar (42) to subsequent proceedings upon facts and questions of law not litigated or passed upon by such decree. *Detrick v. Sharrar*, 95 Pa. St. 521, 525.

"If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." *Hughes v. United States*, 71 U. S., 232, 237; *Converse v. Davis*, 90 Tex. 462, 466.

If the decision of the Supreme Court in the second case be thus limited to the questions considered and determined in the trial court, as it must be so limited under the authority of these cases, what were the questions left open for consideration and determination in any subsequent case? Manifestly, any question involving the merits of the case, and primarily, whether the absence of a decree in the first case in either the Circuit Court or Supreme Court of Hawaii leaves the questions involved in that case open for adjudication in this case. In considering the record in the first case we were of the opinion that it did, and since we find nothing in the second case to change that opinion we might hold upon this fact alone that plaintiffs' claims in this case are open to consideration and determination upon the merits, but the plaintiff in error contending for the bar of the second case upon the broad grounds that the questions there decided constituted in and of themselves an adjudication upon the questions decided, we will consider briefly the remaining questions in the second case.

(1) Whether in the first case the Supreme Court had jurisdiction to answer the reserved questions of fact as to the intention of the testator John H in devising an (43) estate to his daughter Irene and to her children. In the second case the Supreme Court conceded that the Supreme Court in the first case had no such jurisdiction citing *Booth v. Baker*, 10 Haw. 543, 546, but held that the defect was not

such as to make the decision absolutely void. This decision is clearly not binding upon the Federal Court. If the Supreme Court had no jurisdiction to answer a reserved question of fact its answer to such a question was absolutely void. *County Commissioners of Hampshire*, 140 Mass. 181, 182; *Bearce v. Bowker*, 115 Mass. 129; *Terry v. Brightman*, 129 Mass. 535. The effect of lack of jurisdiction in a court is a question open for the determination of any competent court. It is a "Well settled rule in jurisprudence that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon, and brought before the latter, by a party claiming the benefit of such proceedings." *Williamson v. Berry*, 49 U. S. 495; *Guaranty Trust Co. v. Green Cove Railroad Co.*, 139 U. S. 137, 147; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 194.

(2) Whether the Supreme Court in the first case had jurisdiction to construe the will after having decided that there was no longer any trust in existence. The Supreme Court in the second case conceded that the court in the first case, after having decided that there was no longer a trust, should have declined to construe the will. The reason for this concession is not stated. But the only possible reason that could be stated was that the court did not have jurisdiction to decide that question, but the court held that this was an error that did not make the decision void, and that it "as well as other alleged defects above mentioned" was a matter that might be waived by the plaintiff minors (44) so as to preclude a collateral attack by them. The answer to this proposition is the answer to the next question. The third and last question was whether the Circuit Court or the Supreme Court had jurisdiction over the persons of the plaintiffs, notwithstanding they were not represented by separate counsel in a controversy in which their interests were in conflict with the interests of their mother Irene. We are of the opinion that neither the Circuit or Supreme Court obtained jurisdiction over the plaintiffs in the first case, and we do not find from the record that they waived the lack of such jurisdiction.

It therefore appears that in the second case the Supreme Court held that the Court in the first case was without jurisdiction to determine the questions involved in the merits of the case. The opinion of the court that this lack of jurisdiction did not render the decision of the court upon those questions absolutely void is not an opinion binding upon the Federal courts, and we do not concur in that opinion.

If a court "act without authority, its judgments and orders are regarded as nullities; they are not voidable, but simply void; and form no bar to a remedy sought in opposition to them, even prior to a reversal; they constitute no jurisdiction; and all persons concerned in executing such judgments, or sentences, are considered, in law, as trespassers." *Elliott v. Piersol*, 26 U. S. 328, 340; *Williamson v. Berry*, 49 U. S. 495, 555; *Lewers & Cooke v. Redhouse*, 14 Haw. 290, 294.

It follows from these considerations that we do not find that there

has been an adjudication in either of the Hawaiian cases foreclosing the rights of the plaintiffs in the property condemned in this case. And we do find, as did the court below, that each of the defendants in error under the will of John II, deceased, was the owner of an undivided interest in said land in fee simple and is now entitled to a one-third share or interest in the fund in court, subject to the life interest therein of their mother Irene, or the said John II Estate, Limited, as the assignee of her life interest;

The decree of the District court is affirmed.

(Endorsed:) Opinion. Filed Oct. 7 1912. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1996.

THE JOHN II ESTATE, LIMITED, an Hawaiian Corporation, and Charles A. Brown and John A. Magoon, Directors of the John II Estate, Limited, Plaintiffs in Error,

vs.

GEORGE II BROWN and FRANCIS HYDE II BROWN, a Minor, and A. A. Wilder, as Guardian ad Litem of Francis Hyde II Brown, Defendants in Error.

Judgment U. S. Circuit Court of Appeals.

In Error to the District Court of the United States for the Territory of Hawaii.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Territory of Hawaii and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the defendants in error and against the plaintiffs in error.

It is further ordered and adjudged by this Court that the defendants in error recover against the plaintiffs in error for their costs herein expended, and have execution therefor.

(Endorsed:) Judgment. Filed and Entered October 7, 1912. F. D. Monckton, Clerk.

At a Stated Term, to-wit, the October Term, A. D. 1912, of the United States Circuit Court of Appeals for the Ninth Circuit, Held in the Court-Room Thereof, in the City and County of San Francisco, in the State of California, on Thursday, the Thirty-first Day of October, in the Year of Our Lord One Thousand Nine Hundred and Twelve.

Present:

Honorable William B. Gilbert, Circuit Judge.
Honorable Erskine M. Ross, Circuit Judge.
Honorable Charles E. Wolverton, District Judge.

No. 1996.

THE JOHN II ESTATE, LIMITED, an Hawaiian Corporation, et al.,
Plaintiffs in Error,

vs.

GEORGE II BROWN et al., Defendants in Error.

Order Staying Issuance of a Mandate under Rule 32.

Upon motion of counsel for the plaintiffs in error, and pursuant to stipulation of counsel this day filed therefor, it is ordered that the issuance of a Mandate of this Court under Rule 32 in the above-entitled cause be, and hereby is stayed until the 7th day of December, A. D. 1912.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1996.

THE JOHN II ESTATE, LIMITED, an Hawaiian Corporation, and
Charles A. Brown and John A. Magoon, Directors of the John II
Estate, Limited, Plaintiffs in Error,

vs.

GEORGE II BROWN and FRANCIS HYDE II BROWN, a Minor, and A.
A. Wilder, as Guardian ad Litem of Francis Hyde II Brown, De-
fendants in Error.

Petition for Writ of Error and Order that Writ Issue.

To the Honorable Edward D. White, Chief Justice, or any associate
justice of the Supreme Court of the United States:

Now comes John II Estate, Limited, plaintiff in error, by Reuben
D. Silliman, its attorney, and says:

That in the record and proceedings and also in the rendition of the
judgment of the United States Circuit Court of Appeals for the Ninth
Circuit, sitting at San Francisco, in the above-entitled cause, on the
7th day of October, 1912, affirming the judgment of the United

States District Court for the District and Territory of Hawaii, in a cause wherein the United States of America was the plaintiff and the above-named parties and others were defendants, in which said cause, in said District Court, a judgment was rendered in behalf of the United States for the condemnation of certain land of the plaintiff in error upon payment of Ten Thousand Dollars (\$10,000) as an award therefor, and, in which said cause, a further judgment was rendered between John II Estate, Limited, plaintiff in error, as claimant of said award and the whole thereof, and George II Brown and Francis Hyde II Brown, a minor, and A. A. Wilder as guardian ad litem of Francis Hyde II Brown, defendants in error, as claimants of an interest therein, sustaining said claim of said defendants in error, to said alleged interest in said award, manifest error hath intervened to the great damage of the John II Estate, Limited, the plaintiff in error.

And the plaintiff in error further says that the matter in controversy exceeds the sum of One thousand Dollars, besides interest and costs, said judgment of award having been for the sum of Ten Thousand Dollars (\$10,000), the plaintiff in error, the John II Estate, Limited, claiming the whole thereof, and the said District Court of the United States for the District and Territory of Hawaii having adjudged that two-thirds thereof, to wit, the sum of Six thousand six hundred and sixty-six and 67/100 Dollars (\$6,666.67), belongs to said defendants in error, after the death of one Irene II Holloway, who, with her then husband, Charles A. Brown, was the grantor of the land condemned to the plaintiff in error, which said judgment of said District Court was affirmed by said United States Circuit Court of Appeals to the great damage of the plaintiff in error as aforesaid.

And the plaintiff in error further says that said United States District Court for the District and Territory of Hawaii had jurisdiction of said cause by reason of the United States of America having brought said suit, as plaintiff and petitioner; that said proceeding was instituted by the United States of America for the condemnation of a tract of land belonging to the plaintiff in error, in which and to the fund awarded therefor said defendants in error claimed an interest, adversely to the plaintiff in error, which said claim was wrongfully and without warrant of law adjudged in their favor by said United States District Court; which said judgment was thereafter, as hereinbefore alleged, wrongfully and without warrant of law, affirmed by said United States Circuit Court of Appeals; that said case is not one of those in which the judgment of the United States Circuit Court of Appeals is made final and it is a proper case to be reviewed by the Supreme Court of the United States upon a writ of error.

Wherefore your petitioner prays that the writ of error be allowed to the end that the cause may be carried to the Supreme Court of the United States and there reviewed and that a transcript of the record and proceedings, upon which said judgment of affirmance of said United States Circuit Court of Appeals was based, duly authenticated, may be sent to the Supreme Court of the United States, and for such

other process as may be required to perfect the writ of error prayed for.

JOHN H ESTATE, LIMITED,

Plaintiff in Error.

(Signed)

By REUBEN D. SILLIMANN,

Its Attorney.

Order that Writ Issue.

The foregoing Petition having been presented with the Assignment of Errors, and it appearing that the Petitioner is entitled thereto, it is ordered that the Writ of Error as prayed for be allowed.
November 19th, 1912.

(Signed)

JOSEPH McKENNA,

Justice of the Supreme Court of the United States.

(Endorsed:) Petition for Writ of Error and Order that Writ Issue.
Filed Nov. 27, 1912. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1996.

THE JOHN H ESTATE, LIMITED, an Hawaiian Corporation, and Charles A. Brown and John A. Magoon, Directors of the John H Estate, Limited, Plaintiffs in Error,

vs.

GEORGE H BROWN and FRANCIS HYDE H BROWN, a Minor, and A. A. Wilder, as Guardian ad Litem of Francis Hyde H Brown, Defendants in Error.

Assignment of Errors.

Now, on this 12th day of November, A. D. Nineteen hundred and twelve, comes the John H Estate, Limited, plaintiff in error, by Reuben D. Silliman, its attorney and says:

That in the record and proceedings in the above entitled cause, there is manifest error in this, to wit:

First. That the United States Circuit Court of Appeals for the Ninth Circuit erred in affirming the judgment of the District Court of the United States in and for the District and Territory of Hawaii, brought before it for review by writ of error to said District Court of Hawaii.

Second. That said court erred in refusing to reverse said judgment of the United States District Court of Hawaii.

Third. That said court erred in ruling that the decision of the Supreme Court of the Territory of Hawaii in the "second" case entitled "George H Brown and Francis Hyde H Brown, minors by their next friend, Albert F. Judd, plaintiffs, v. Charles A. Brown, John A.

Magoon and Irene II Holloway, defendants," was not res judicata, final and conclusive upon the defendants in error in the controversy between said defendants in error and the plaintiff in error, in said United States District Court of Hawaii.

Fourth. That said court erred in ruling that the decision of the Supreme Court of the Republic of Hawaii, in the "first" case, entitled "Irene Haalou II Brown, a married woman, and George II Brown and Francis Hyde II Brown, minors, by their next friend, A. F. Judd, and A. F. Judd v. Charles A. Brown," was not res judicata, final and conclusive upon the defendants in error in the controversy between said defendants in error and the plaintiff in error in said United States District Court of Hawaii.

Fifth. That said court erred in ruling as follows:

"It follows from these considerations that we do not find that there has been an adjudication in either of the Hawaiian cases foreclosing the rights of the plaintiffs in the property condemned in this case. And we do find, as did the court below, that each of the defendants in error under the will of John II, deceased, was the owner of an undivided interest in said land in fee simple and is now entitled to a one-third share or interest in the fund in court, subject to the life interest therein of their mother Irene, or the said John II Estate, Limited, as the assignee of her life interest."

Sixth. That said court erred in ruling that said Irene Haalou II Brown did not take a fee simple estate under her father's will as was decided by the Supreme Court of the Republic of Hawaii in said "first" case.

Seventh. That said court erred in ruling that said Irene Haalou II Brown took an estate for life under the will of her father John II and that said children were entitled to remainders under said John II's will.

Eighth. That said court erred in affirming the ruling and judgment of the United States District Court of Hawaii in said action, namely: "That after the death of Irene II Holloway, said sum of \$5,635.67 (being two-thirds of the amount adjudged as the value of the property condemned by the United States Government in the condemnation proceeding instituted by it in the United States District Court for Hawaii, in which said controversy arose) belongs absolutely in equal shares to said George II Brown and Francis Hyde II Brown, and to any other children that may hereafter be born to said Irene II Holloway."

Ninth. That the said court erred in affirming the ruling and judgment of said United States District Court of Hawaii where it was held that "upon the death of said Irene II Holloway (said John II Estate, Limited, was) to pay said principal sum and accrued increment in equal shares to said George II Brown and Francis Hyde II Brown or their respective representatives, provided that if any other children shall be hereafter born to said Irene II Holloway, said principal sum and accrued increment shall be paid on the death of said Irene II Holloway in equal shares to said George II Brown and Francis Hyde II Brown, and such other children, or their respective representatives."

Tenth. The plaintiff in error assigns and reaffirms the several assignments of error, filed in the District Court of the United States for the District and Territory of Hawaii and appearing in the transcript filed in the United States Circuit Court of Appeals for the Ninth Circuit on pages 377 to 379. Error in said record and proceedings is assigned in that Irene Li Holloway (formerly Irene Haalou Li Brown) was adjudged by said District Court to have an estate for life only in the property devised to her by the will of her father, John Li, deceased, a portion of which was condemned by the United States of America in said suit, in that said District Court refused to find that said Irene Li Holloway (formerly Irena Haalou Li Brown) had an estate in fee simple as was decided by the Supreme Court of the Republic of Hawaii in the "first" case between said defendants in error, by their next friend, A. F. Judd, and others, as plaintiffs, and Charles A. Brown, as defendant, in that it was ruled by Judge Dole of said United States District Court of Hawaii that the defendants in error were not bound by the said decision of the Supreme Court of the Republic of Hawaii nor by the decision in the "second" case, instituted by their guardian ad litem, Albert F. Judd, against Charles A. Brown, John A. Magoon and Irene Li Holloway (formerly Irene Haalou Li Brown) in the Circuit Court of the First Circuit, Territory of Hawaii, in which said case, upon appeal, the Supreme Court of the Territory of Hawaii decided that said decision of the Supreme Court of the Republic of Hawaii could not be collaterally attacked by said defendants in error.

And the plaintiff further reassigns error, in the record and proceedings in said United States District Court of Hawaii in that it was adjudged by said court that the defendants in error had an interest in the land condemned in said proceeding brought by the United States of America in said United States District Court, as remaindermen under the will of John Li, deceased, and in that the defendants in error were adjudged by said United States District Court to be entitled to two thirds of the award for the land condemned—to wit, \$6,666.67 thereof, after the death of Irene Li Holloway (formerly Irene Haalou Li Brown).

JOHN H ESTATE, LIMITED,

Plaintiff in Error,

(Signed)

By REUBEN D. SILLIMAN,

Its Attorneys.

(Endorsed:) Assignment of Errors. Filed Nov. 27, 1912. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1996.

THE JOHN II ESTATE, LIMITED, an Hawaiian Corporation, and Charles A. Brown and John A. Magoon, Directors of the John II Estate, Limited, Plaintiffs in Error,

VS.

GEORGE II BROWN and FRANCIS HYDE II BROWN, a Minor, and A. A. Wilder, as Guardian ad Litem of Francis Hyde II Brown, Defendants in Error.

Bond on Writ of Error.

Know all men by these presents, that the John II Estate, Limited, an Hawaiian Corporation, by Reuben D. Silliman, attorney for Plaintiff in Error, as principal, and Charles A. Brown, as surety, are jointly and severally held and firmly bound unto George II Brown and Francis Hyde II Brown, a minor, by his guardian ad litem, A. A. Wilder, Defendants in Error, and to each of them, in the full and just sum of One thousand dollars (\$1000), to be paid to the said George II Brown and Francis Hyde II Brown, a minor, by his guardian ad litem, A. A. Wilder, defendants in error, or their attorneys, representatives, successors or assigns, to which payment well and truly to be made we bind ourselves, our successors, representatives and assigns, jointly and severally, firmly by these presents.

Witness our hands and seals this 29th day of October, 1912.

Whereas, lately at a session of the United States Circuit Court of Appeals for the Ninth Circuit, on a Writ of Error to the District Court of the United States for the District and Territory of Hawaii, in a cause between said John II Estate, Limited, an Hawaiian Corporation and Charles A. Brown and John A. Magoon, Plaintiffs in Error against said George II Brown and Francis Hyde II Brown, a minor, by his guardian ad litem, A. A. Wilder, defendants in Error, judgment was rendered affirming the judgment in favor of said defendants in Error, rendered in said District Court of the United States in and for the District and Territory of Hawaii in said suit instituted by the United States of America as plaintiff against said John II Estate, Limited and others, and the said John II Estate, Limited, having obtained from the Supreme Court of the United States to the United States Circuit Court of Appeals for the Ninth Circuit a Writ of Error to reverse the said judgments of the United States Circuit Court of Appeals for the Ninth Circuit and of said District Court of the United States for the District and Territory of Hawaii and having filed a copy thereof in the clerk's office of the said United States Circuit Court of Appeals, and citation, directed to the said George II Brown and Francis Hyde II Brown, a minor, by his guardian ad litem, A. A. Wilder, defendants in Error, is about to issue citing and admonishing them and each of them to be and appear at the Supreme Court of the United States to be held at the City of

Washington, within sixty days from the day of the signing of said citation.

Now, the condition of this obligation is such, that if the said John H Estate, Limited, plaintiff in Error, shall prosecute the said Writ of Error to effect, and shall answer all damages and costs that may be awarded against it if it shall fail to make good its plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

JOHN H ESTATE, LIMITED,

(Signed) By Its Attorney, REUBEN D. SILLIMAN. [SEAL.]

(Signed) CHARLES A. BROWN. [SEAL.]

STATE OF MASSACHUSETTS,

County of Middlesex, ss:

Charles A. Brown, whose name is subscribed to the foregoing bond as Surety, being duly sworn, deposes and says: that he is a resident and freeholder within the District and Territory of Hawaii; that he has in his own right within said District, real property of more than the value of Two thousand Dollars (\$2000), over and above all just debts and liabilities, and excluding property exempt from execution.

Subscribed and sworn to before me this 29 day of October, 1912.

[NOTARIAL SEAL.] (Signed) FREDERIC A. FISHER,

Notary Public within and for the Commonwealth of Massachusetts.

(Endorsed:) Bond on writ of error. (Approved by Associate Justice McKenna.) Filed Nov. 27, 1912. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, ss:

To George H Brown and Francis Hyde H Brown, a Minor, and A. A. Wilder as Guardian ad Litem of Francis Hyde H Brown, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein The John H Estate, Limited, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph McKenna, Associate Justice of the Supreme Court of the United States — 19th day of November, in the year of our Lord one thousand nine hundred and twelve.

(Signed) JOSEPH McKENNA,
*Associate Justice of the Supreme Court
of the United States.*

(Endorsed:) Citation on writ of error. Filed Nov. 27, 1912.
F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1996.

THE JOHN II ESTATE, LIMITED, an Hawaiian Corporation, and
Charles A. Brown and John A. Magoon, Directors of the John II
Estate, Limited, Plaintiffs in Error,

VS.

GEORGE II BROWN and FRANCIS HYDE II BROWN, a Minor, and A. A.
Wilder, as Guardian ad Litem of Francis Hyde II Brown, Defend-
ants in Error.

*Stipulation Waiving Bond on Writ of Error and Service of Papers
on Such Writ of Error.*

The Defendants in Error herein, George II Brown and Francis
Hyde II Brown, a minor, and A. A. Wilder as guardian ad litem of
Francis Hyde II Brown, hereby waive the execution or filing of any
bond on any writ of error taken by all or any of the Plaintiffs in
Error herein to the Supreme Court of the United States to review the
judgment of the above entitled court in this cause, and also waive
service of the petition for such writ of error, order for such writ of
error, such writ of error itself, the assignment of errors and the cita-
tion on such writ of error, as well as of any and all other papers neces-
sary to perfect such writ of error; it being, however, understood that
upon the filing of such papers copies thereof shall be promptly mailed
by the Plaintiffs in Error to the attorneys for said Defendants in
Error at Honolulu, Territory of Hawaii; and also to Messrs. Mc-
Clanahan & Derby at San Francisco, California.

Dated: October 30, 1912.

(Signed)

F. E. THOMPSON.

(Signed)

E. M. WATSON.

Attorneys for Defendants in Error.

(Signed)

A. A. WILDER.

Guardian ad Litem of said Francis Hyde II Brown.

(Endorsed:) Stipulation waiving bond on writ of error and serv-
ice of certain papers. Filed Nov. 27, 1912. F. D. Monckton, Clerk
U. S. Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1996.

THE JOHN H ESTATE, LIMITED, an Hawaiian Corporation, and Charles A. Brown and John A. Magoon, Directors of the John H Estate, Limited, Plaintiffs in Error,

vs.

GEORGE H BROWN and FRANCIS HYDE H BROWN, a Minor, and A. A. Wilder, as Guardian ad Litem of Francis Hyde H Brown, Defendants in Error.

Admission of Service and Receipt of Certain Papers.

The undersigned hereby acknowledge due service and receipt of copies of the following papers in the matter of the writ of error to the Supreme Court of the United States to review the judgment of the above entitled Court in this case, to wit:

1. Petition for Writ of Error with order allowing same.
2. Assignment of errors.
3. Writ of error.
4. Bond on writ of error.
5. Citation on writ of error.

Dated at San Francisco, this 26th day of November, 1912.

(Signed)

McCLANAHAN & DERBY.

(Endorsed:) Admission of service and receipt of certain papers. Filed Nov. 27, 1912. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1996.

THE JOHN H ESTATE, LIMITED, an Hawaiian Corporation, and Charles A. Brown and John A. Magoon, Directors of the John H Estate, Limited, Plaintiffs in Error,

vs.

GEORGE H BROWN and FRANCIS HYDE H BROWN, a Minor, and A. A. Wilder, as Guardian ad Litem of Francis Hyde H Brown, Defendants in Error.

Affidavit of Reuben D. Silliman of Service of Certain Papers on Writ of Error to Supreme Court U. S.

STATE OF NEW YORK,

County of New York, ss:

Reuben D. Silliman being first duly sworn says:

That on November 20th, 1912, he mailed to Messrs. F. E. Thompson and E. M. Watson, attorneys for the above named Defendants

in Error, and A. A. Wilder, Guardian Ad Litem of Francis Hyde II Brown, copies of the following papers:

- (1) Petition for Writ of Error with order allowing same.
- (2) Assignment of Errors.
- (3) Writ of Error.
- (4) Bond on writ of error.
- (5) Citation on writ of error.

(Signed)

REUBEN D. SILLIMAN.

Subscribed and sworn to before me this 4th day of December, 1912.

(Signed)

WILLIAM R. BAYES,

Notary Public, Kings County.

[SEAL.]

Certificate filed in New York & Westchester Counties.

(Endorsed:) Affidavit of Reuben D. Silliman of Service of Certain Papers on Writ of Error to Supreme Court U. S. Filed Dec. 10 1912 F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1996.

THE JOHN II ESTATE, LIMITED, an Hawaiian Corporation, and Charles A. Brown and John A. Magoon, Directors of the John II Estate, Limited, Plaintiffs in Error.

vs.

GEORGE II BROWN and FRANCIS HYDE II BROWN, a Minor, and A. A. Wilder, as Guardian ad Litem of Francis Hyde II Brown, Defendants in Error.

Præcipe for Transcript on Writ of Error to Supreme Court U. S.

To the Clerk of the said Court:

SIR: Please issue printed Transcript of Record used in your Court: Order of Submission; Opinion; Judgment; Order Staying Issuance of Mandate; Petition for Writ of Error; Assignment of Errors; Writ of Error; Bond on Writ of Error; Citation on Writ of Error; Admission of Service; Stipulation waiving bond and service of papers on Writ of Error, and Affidavit of mailing copies of papers upon allowance of Writ of Error to Messrs. Thompson, Watson & Wilder of Honolulu, Hawaii.

Please embody in your Certificate of Return the following:

"I further certify that the title-head 'Opinion,' printed in Gothic type at the head of the document commencing at page 151 of the Printed Transcript of Record in the above-entitled cause, does not appear at the head of said document in the original typewritten Transcript in said cause, but was inserted as a title, ready reference or index head pursuant to the practice and the provisions of the twenty-third rule of said Circuit Court of Appeals.

I further certify that the title-head, 'Opinion of Supreme Court in George H Brown, et al., vs. Charles A. Brown, et al.,' printed in Gothic type at the head of the document commencing at page 225 of said Printed Transcript of Record does not appear at the head of said document in the original typewritten Transcript of Record in said cause, but was inserted at the head of said document in said Printed Transcript of Record as a title, ready reference or index head pursuant to the practice and the provisions of said twenty-third rule.

Also please transfer to the Clerk of the Supreme Court of the United States the twenty-five additional copies of the record used in your court and lodged with you under the Act of February 13th, 1911, Chapter 47.

(Signed)

REUBEN D. SILLIMAN,
Attorney for Plaintiff in Error.

Receipt of a copy of the within praecipe is hereby admitted this 9th day of December, 1912.

(Signed)

McCLANAHAN & DERBY.

(Endorsed:) Praecipe for Transcript on Writ of Error to Supreme Court U. S. Filed Dec. 10 1912. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 1996.

THE JOHN H ESTATE, LIMITED, an Hawaiian Corporation, and Charles A. Brown and John A. Magoon, Directors of the John H Estate, Limited, Plaintiffs in Error,

vs.

GEORGE H BROWN and FRANCIS HYDE H BROWN, a Minor, and A. A. Wilder, as Guardian ad Litem of Francis Hyde H Brown, Defendants in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Proceedings and Transcript of Record upon Return to Writ of Error.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing seventy-three (73) pages, numbered from and including one (1) to and including seventy-three (73), to be a full, true and correct copy of the Assignment of Errors, and of all proceedings had in the above-entitled case in the said the United States Circuit Court of Appeals for the Ninth Circuit, including the Opinion filed therein, as the same remain on file and of record in my office, and that the same in connection with the preceding certified copy of the Printed Transcript of Record constitute a true copy of the complete record and the Transcript of Record in said cause upon return to the annexed Writ of Error from the Supreme Court of the United States.

Attest my hand and the seal of the said the United States Cir-

cuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 21st day of December A. D. 1912.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
*Clerk United States Circuit Court of
Appeals for the Ninth Circuit.*

UNITED STATES OF AMERICA, ss.:

[Seal of the Supreme Court of the United States.]

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit. Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between The John II Estate, Limited, an Hawaiian Corporation, and Charles A. Brown and John A. Magoon, Directors of the John II Estate, Limited, plaintiff in Error, and George II Brown and Francis Hyde II Brown, a Minor, and A. A. Wilder, as Guardian Ad Litem of Francis Hyde II Brown, defendants in Error, a manifest error hath happened, to the great damage of the said plaintiff in Error, The John II Estate, Limited, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within sixty days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court, the 19th day of November, in the year of our Lord One thousand nine hundred and twelve.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Return to Writ of Error.

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit to the within Writ of Error.

As within we are commanded, we certify under the seal of our said Circuit Court of Appeals, in a certain schedule to this writ an-

nexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

By the Court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
*Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit.*

[Endorsed:] No. 1996. United States Circuit Court of Appeals for the Ninth Circuit. The John H Estate, Limited, et al., Plaintiffs in Error, vs. George H Brown, et al., Defendants in Error. Writ of Error. Filed Nov. 27, 1912. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. Reuben D. Silliman, for Plaintiffs in Error, 40 Wall Street, New York.

UNITED STATES OF AMERICA, ss:

To George H Brown and Francis Hyde H Brown, a Minor, and A. A. Wilder, as Guardian ad Litem of Francis Hyde H Brown, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein The John H Estate, Limited, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph McKenna, Associate Justice of the Supreme Court of the United States 19th day of November, in the year of our Lord, one thousand nine hundred and twelve.

JOSEPH MCKENNA,
*Associate Justice of the Supreme Court
of the United States.*

[Endorsed:] Docketed. No. 1996. United States Circuit Court of Appeals for the Ninth Circuit. The John H Estate, Limited, et al., Plaintiffs in Error, vs. George H Brown, et al., Defendants in Error. Citation. Filed Nov. 27, 1912. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. Reuben D. Silliman, for Plaintiffs in Error, 40 Wall Street, New York.

Endorsed on cover: File No. 23,504. U. S. Circuit Court Appeals, 9th Circuit. Term No. 929. The John H Estate, Limited, plaintiff in error, vs. George H Brown and Francis Hyde H Brown, a minor, and A. A. Wilder, as guardian ad litem of Francis Hyde H Brown. Filed January 15, 1913. File No. 23,504.



MAY 26 1914
JAMES D. HANER
CLERK

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1913.

No. ~~100~~ 98

THE JOHN H ESTATE, LIMITED,

Plaintiff in Error.

against

GEORGE H BROWN and FRANCIS HYDE H BROWN, A MINOR, AND
A. A. WILDER, AS GUARDIAN AD LITEM OF FRANCIS HYDE H BROWN,
Defendants in Error.

ON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

BRIEF OF PLAINTIFF IN ERROR

Upon the conclusiveness of the judgments in the two prior cases.

REUBEN D. SILLIMAN,
JOSEPH LAROCQUE,
CLARENCE BLAIR MITCHELL,

For Plaintiff in Error.

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IN THE
Supreme Court of the United States.

THE JOHN H ESTATE, LIMITED,
Plaintiff in Error,

AGAINST

GEORGE H BROWN and FRANCIS
HYDE H BROWN, a Minor,
and A. A. WILDER, as Guar-
dian *ad Litem* of Francis
Hyde H Brown,
Defendants in Error.

UPON WRIT OF ERROR TO THE UNITED STATES CIR-
CUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF PLAINTIFF IN ERROR.

**Upon the Conclusiveness of the Judg-
ments in the two Prior Cases.**

STATEMENT OF THE CASE.

This cause comes before this court upon a writ of error to the United States Circuit of Appeals for the Ninth Circuit, to review a judgment of that court affirming a judgment of the United States District Court of Hawaii upon the claims of contesting claimants to a fund of \$10,000 paid into said district court, by the United States, for

a tract of land, containing fifty acres, situated on the Island of Oahu, one of the Hawaiian Islands, taken in condemnation proceedings brought by the United States in said court .

Although only \$10,000 are directly involved, leases, conveyances and other property worth more than half a million dollars are affected by the proceedings in this case. (See the District Judge's opinion, transcript pages 366-367.)

The United States brought the condemnation proceeding, in which the judgment complained of was entered. The case may be taken here after final judgment in the circuit court of appeals.

Sharp v United States, 191 U. S. 341.

The Proceedings in the United States District Court.

The proceedings in that court followed the local law. (See Secs. 501-502, Revised Laws of Hawaii copied in the appendix to this brief, p. 89.)

After the judgment of award was entered in the District Court (Transcript, 29, 33, 34), the parties hereto, upon notice given as required by said judgment (Tr., 38), pleaded their claims (Tr., 41-51.)

The Claims of the Parties as Filed in the District Court.

The John Ii Estate, Limited, the plaintiff in error, claimed the whole of the award upon the ground that the land for which the \$10,000 was paid belonged to it in fee simple; alleging that the land was devised by John Ii in fee to his daughter, Irene Ii, by a will admitted to probate in the Supreme Court of the Hawaiian Islands on the 10th day of June, 1870; that the Supreme Court of

the Hawaiian Islands by a decision rendered May 4, 1897 (11 Hawaiian, 47), adjudged that Irene Ii had a fee simple title to the land in controversy; that said Irene Ii and her husband, Charles A. Brown, thereafter conveyed said land and other lands to Henry Holmes, as trustee, and that Holmes conveyed the same to said John Ii Estate, Limited, (the plaintiff in error here) both of said deeds being dated in July, 1897; that the Supreme Court of the Territory of Hawaii, by a decision rendered November 21, 1903 (15 Hawaiian, 308), adjudged that the Supreme Court decision in said first case could not be collaterally attacked by the defendants in error; that the controversy was *res judicata*; that the defendants in error were estopped to claim the fund and that no other person had any interest, right or claim in the money awarded for the land condemned. (Tr., 41-42.)

The defendants in error, George Ii Brown and Francis Hyde Ii Brown, a minor, claimed an interest in the fund by way of remainder under the will of John Ii, and, filing separate statements, alleged that the proceedings and decision (which they called an "opinion") of the Hawaiian Supreme Court in the first case were not binding upon them for the following reasons:

"1. That the cause in which said opinion was rendered was a suit in equity, and said opinion was rendered upon questions reserved in said suit by the Circuit Judge before whom said suit came on for hearing, but said Circuit Judge was without authority of law or jurisdiction to so reserve said questions in said suit.

"2. That said Supreme Court had no jurisdiction or authority to hear, determine or otherwise pass on the questions so reserved as aforesaid.

"3. That said Supreme Court at the time of the rendition of said opinion was composed or constituted of Associate Justice

Whiting (of said Court) and two members of the bar of said Court, namely W. R. Castle, Esq., and Paul Neumann, Esq., who sat as substitute Justices in said cause at the request of said Associate Justice Whiting; but said request was made without any right or authority of law, and said Court as so composed and constituted was not a legally constituted court, and its said opinion was therefore without any legal effect.

"4. That this claimant was not a party to said suit.

"5. That the purported attempt of A. F. Judd to represent this claimant in said suit as his next friend was illegal, null and void, in that said A. F. Judd was at the same time acting, or purporting to act, as the next friend of this claimant's mother whose interests in said suit were adverse to this claimant's interests therein on the question as to the nature of the estate in said land devised to her in and by said will.

"6. That the jurisdiction of said Supreme Court, if it ever acquired jurisdiction, in said suit, was, under the pleadings in said suit, limited to the determination of the question whether any trust was then in existence concerning the property devised by said will, and that its jurisdiction ended upon its determining that no such trust existed.

"7. That no judgment, order or decree was ever made in any of the aforesaid proceedings in said suit in equity, pursuant to said opinion of said Supreme Court, or otherwise, adjudicating or determining the rights of this claimant under said will in any of the property therein or thereby devised."

Of the proceedings and decision in the second case, they severally pleaded:

"That, further answering the statement of claim of said John Ii Estate, Limited, this claimant says that the opinion of the Supreme Court of the Territory of Hawaii rendered on November 21, 1903 (Volume 15,

Hawaiian Reports, page 308) did not adjudicate or determine this claimant's right or title in any of the property devised by the will of said John II, deceased, and does not affect this claimant's right or claim in or to said fund in court" (Tr., 51).

The Controversy.

The plaintiff in error insists that the proceedings and decision of the Supreme Court of the Republic of Hawaii in the first case, especially in view of the proceedings and decision in the second case, are a judgment upon the claim of the defendants in error. The plaintiff in error also insists that the two decisions of the Hawaiian supreme court establish the law of Hawaii. The first decision was rendered before the plaintiff in error acquired its title. The second, rendered in a suit instituted by these defendants in error by their next friend, as sole plaintiffs, passed adversely to them upon the very defects set up in their statements of claim filed in this proceeding. Said statements of claim are but a repetition of the points and propositions pleaded and decided in the two prior cases.

The facts (except as presently stated) were stipulated by counsel and the stipulation placed upon the record in the Trial Court (Tr., 59-72).

Transcripts (four in number) of the proceedings in the Hawaiian circuit and supreme courts, in the two prior cases, were read in evidence, without objection.

(The record in the Hawaiian circuit court in the first case will be found printed on pages 77-139 of the transcript. The record of the supreme court in the first case covers pages 139-160 of the transcript;

the record of the Hawaiian Circuit Court in the second case covers transcript 160-223; while the record of the supreme court in the second case covers transcript 224-234.)

The translation of the will of John Li, deceased (which was in the Hawaiian language), was also agreed upon by counsel for the contesting parties (Tr., 61-63), but, the agreed translation was not altogether satisfactory to Judge Dole (who had been a trustee under John Li's will and a party plaintiff in the first Hawaiian case) and oral evidence, as to the meaning of one clause of the will, was taken. (Tr., 74-75.) Other than this there was no contest over the facts.

Exception was taken by the plaintiff in error to the finding for the two Brown children (Tr., 76.) The bill of exceptions (Tr., 58-372), includes all of the evidence adduced in the court below and the writ of error brings up for review, as stated in the opinion of the Circuit Court of Appeals (Tr., 406), a judgment entered on what was substantially an agreed statement of facts. Such a judgment is, of course, reviewable in this court in a case that may be properly brought here.

United States v. Eliason, 16 Peters
291, 301.

*Stimson v. Baltimore & Susquehanna
R. R. Co.*, 10 How., 329, 346.

The Questions Involved.

On the branch of the controversy discussed in this brief, the questions involved may be stated thus:

1. Are the judicial proceedings and judgment of the highest court of a former government (the Republic of Hawaii) respecting a land title and the construction of a will, to be given effect by the Federal courts in a subsequent proceeding between

persons who were parties plaintiff in said prior case contesting with the purchaser of a party plaintiff and the defendant in said prior case?

2. Are the judicial proceedings, decision and judgment of the highest court of a concurrent government (the Territory of Hawaii) passing upon matters of procedure in the local courts and directly holding that the proceedings and judgment in said prior case could not be collaterally attacked by these defendants in error, to be given effect by the Federal courts, said second suit having been instituted by the defendants in error here to obtain a judgment that the proceedings and decision in the first case were invalid as to them?

3. The right of the grantors of the plaintiff in error to convey a fee simple title to the land in controversy was directly adjudged by the supreme court of the Republic of Hawaii in a case to which these defendants in error were parties plaintiff by their next friend, and, to which the grantors of the plaintiff in error, Charles A. Brown and Irene Ii Brown, were also parties, Charles A. Brown, being the defendant, and his wife, Irene Ii Brown, now Mrs. Holloway, being a party plaintiff; in a second suit, brought by a second next friend of the defendants in error against said Charles A. Brown and his said former wife, the supreme court of the Territory of Hawaii decided that the supreme court of the Republic of Hawaii was legally constituted, had jurisdiction of the controversy and of the defendants in error and that those defendants in error could not collaterally attack the supreme court judgment or "decision" in the first case. Are said decisions to be given effect by the Federal courts?

4. The Supreme court of the Republic of Hawaii, at the time the first case was decided by it, was the

highest court of the former government, whose "decisions" were its judgments; said "decisions", by the express language of five Hawaiian constitutions, covering a period of sixty years from the very beginning of constitutional government until after the passage of the Hawaiian Territorial act, were declared to be "final and conclusive upon all parties". (See the appendix of this brief, pp. 89-92, where the constitutional provisions referred to are copied.) The supreme court of the Territory was, at the time of the second case (1903), the highest court to which the second controversy could be carried. (See *Harrison v. Magoon*, 205 U. S. 501.) The former court adjudged that one of the grantors of the plaintiff in error, Irene Ii Brown, had a fee simple title to the lands in controversy, while the latter court held, upon pleadings specially framed to obtain a determination of the very matter, that these defendants in error could not collaterally attack the supreme court "decision" or judgment in the first case. May said "decisions" be ignored by the Federal courts for matters of "pure form", not required by the Hawaiian law?

5. No fraud or collusion in the proceedings or decisions or in any of the dealings of the plaintiff in error, or of Mrs. Holloway, or C. A. Brown or either of the next friends of the defendants in error has ever been charged; but, on the contrary, Judge Dole said the children had been "generously treated" (Tr., 366), although he mistakenly added, "They have repudiated the transaction by which they would receive about one-third of the Estate in present enjoyment in lieu" of two-thirds in remainder. (Tr., 367.) The fact is they have never offered to give up any of their shares in the plaintiff in error, but, on the contrary, the elder, having attained majority, has taken his part of the shares

over and collected the dividends thereon. (Tr., 60.) Are the defendants in error estopped by the prior judgments in said cases to which they were parties and by their conduct and that of their next friends, from claiming an interest in the fund awarded for the land?

The Opinions of the Courts below.

District Judge Dole's opinion covers forty-two pages of the printed transcript. (Tr., 326-368.) But the plaintiff in error feels that he did not approach the controversy with an open mind because of his former connection with it, since he had been, for eleven years (from 1875 until 1886), an administrator and trustee under the will of John H. (Tr., 402.) Having then resigned, he afterward unsuccessfully asserted, as one of the plaintiffs in the first case, that he and his joint associate, Judd, were entitled to be reinstated on the theory that Mrs. Holloway's estate was for life only and that Judd and himself and their successors in trust had been constituted trustees for the lives of Mrs. Holloway and her children (Tr., 120), and that, after her death, the children had an estate as remaindermen. The Supreme Court of Hawaii decided against the contention, in direct answer to specific questions reserved to it by the Hawaiian Circuit Judge, with the written consent of counsel for the parties. (Tr., 140, 154-5.) The Hawaiian Supreme Court decided that Mrs. Holloway had an estate in fee simple. (Tr., 155.) Judge Dole, in the District Court below, reasoned that the decision was not binding on him because of alleged jurisdictional defects, none of which however were suggested by him or any of the counsel in the first case, and all of which, with an unimportant exception, that at most was a mere irregularity and wholly in-

cidental to the main point put forward, were expressly pleaded and passed upon in the second case. (Tr., 338.) Judge Dole held that the decision in the second case was not binding upon him because he did not agree with the Hawaiian Supreme Court's reasoning, overlooking the fact of its decision and judgment. (Tr., 340-348.)

The Circuit Court of Appeals also filed a very long opinion (Tr., 397-422) but the plaintiff in error feels that it simply adopted, without giving sufficient consideration to his point of view, Judge Dole's theories, citations and conclusions. It reversed the order of the questions involved, as argued by the plaintiff in error, and assumed that the primary question was the construction of the will of John Li, which was treated as a question of fact and made to turn upon the interpretation of the alleged "disputed clause" of the John Li will. (Tr., 359-363.)

Specifications of Error.

The matter in controversy is fully covered by appropriate assignments of error. (Tr., 425-7.) They challenge the rulings of the Circuit Court of Appeals and of the District Court, upon the questions involved. They are as follows:

FIRST: That the United States Circuit Court of Appeals for the Ninth Circuit erred in affirming the judgment of the District Court of the United States in and for the District and Territory of Hawaii, brought before it for review by writ of error to said District Court of Hawaii.

SECOND: That said court erred in refusing to reverse said judgment of the United States District Court of Hawaii.

THIRD: That said court erred in ruling that the decision of the Supreme Court of the Territory of Hawaii in the "second" case entitled "George Ii Brown and Francis Hyde Ii Brown, minors by their next friend, Albert F. Judd, plaintiffs, *v.* Charles A. Brown, John A. Magoon and Irene Ii Hallowsay, defendants," was not *res judicata*, final and conclusive upon the defendants in error in the controversy between said defendants in error and the plaintiff in error, in said United States District Court of Hawaii.

FOURTH: That said court erred in ruling that the decision of the Supreme Court of the Republic of Hawaii, in the "first" case, entitled "Irene Haalou Ii Brown, a married woman, and George Ii Brown and Francis Hyde Ii Brown, minors, by their next friend, A. F. Judd, and A. F. Judd *v.* Charles A. Brown," was not *res judicata*, final and conclusive upon the defendants in error in the controversy between said defendants in error and the plaintiff in error in said United States District Court of Hawaii.

FIFTH: That said court erred in ruling as follows:

"It follows from these considerations that we do not find that there has been an adjudication in either of the Hawaiian cases foreclosing the rights of the plaintiffs in the property condemned in this case. And we do find, as did the court below, that each of the defendants in error under the will of John Ii, deceased, was the owner of an undivided interest in said land in fee simple and is now entitled to a one-third share or interest in the fund in court, subject to the life interest therein of their mother Irene, or the said John Ii Estate, Limited, as the assignee of her life interest."

SIXTH: That said court erred in ruling that said Irene Haalou Ii Brown did not take a fee simple estate under her father's will as was decided by the Supreme Court of the Republic of Hawaii, in said "first" case.

SEVENTH: That said court erred in ruling that said Irene Haalou Ii Brown took an estate for life under the will of her father John Ii and that said children were entitled to remainders under said John Ii's will.

EIGHTH: That said court erred in affirming the ruling and judgment of the United States District Court of Hawaii in said action, namely: "That after the death of Irene Ii Holloway, said sum of \$6,666.67 (being two-thirds of the amount adjudged as the value of the property condemned by the United States Government in the condemnation proceeding instituted by it in the United States District Court for Hawaii, in which said controversy arose) belongs absolutely in equal shares to said George Ii Brown and Francis Hyde Ii Brown, and to any other children that may hereafter be born to said Irene Ii Holloway."

NINTH: That the said court erred in affirming the ruling and judgment of said United States District Court of Hawaii where it directed that "upon the death of said Irene Ii Holloway (said John Ii Estate, Limited, was) to pay said principal sum and accrued increment in equal shares to said George Ii Brown and Francis Hyde Ii Brown or their respective representatives, provided that if any other children shall be hereafter born to said Irene Ii Holloway, said principal sum and accrued increment shall be paid on the death of said Irene Ii Holloway in equal shares to said George Ii

Brown and Francis Hyde li Brown, and such other children, or their respective representatives."

TENTH: The plaintiff in error assigns and reaffirms the several assignments of error, filed in the District Court of the United States for the District and Territory of Hawaii and appearing in the transcript filed in the United States Circuit Court of Appeals for the Ninth Circuit on pages 377 to 379. Error in said record and proceedings is assigned in that Irene li Holloway (formerly Irene Haalon li Brown, was adjudged by said District Court to have an estate for life only in the property devised to her by the will of her father, John li, deceased, a portion of which was condemned by the United States of America in said suit, in that said District Court refused to find that said Irene li Holloway (formerly Irene Haalon li Brown) had an estate in fee simple as was decided by the Supreme Court of the Republic of Hawaii in the "first" case between said defendants in error, by their next friend, A. F. Judd, and others, as plaintiffs, and Charles A. Brown, as defendant, in that it was ruled by Judge Dole of said United States District Court of Hawaii that the defendants in error were not bound by the said decision of the Supreme Court of the Republic of Hawaii nor by the decision in the "second" case, instituted by their guardian *ad litem*, Albert F. Judd against Charles A. Brown, John A. Magoon and Irene li Holloway (formerly Irene Haalon li Brown) in the Circuit Court of the First Circuit, Territory of Hawaii in which said case, upon appeal, the Supreme Court of the Territory of Hawaii decided that said decision of the Supreme Court of the Republic of Hawaii could not be collaterally attacked by said defendants in error.

And the plaintiff further reassigns error, in the record and proceedings in said United States Dis-

trict Court of Hawaii in that it was adjudged by said court that the defendants in error had an interest in the land condemned in said proceeding brought by the United States of America in said United States District Court, as remaindermen under the will of John Li deceased, and in that the defendants in error were adjudged by said United States District Court to be entitled to two-thirds of the award for the land condemned, to wit, \$6,636.67 thereof, after the death of Irene Li Holloway (formerly Irene Haalou Li Brown). (Tr., 425-7.)

THE FIRST BROWN CASE— II HAWAIIAN 47.

April 7, 1894, after the marriage of Mrs. Holloway (the Irene Li of the will) with C. A. Brown and the birth of three Brown children, A. F. Judd, one of the executors of the last will of John Li and one of the guardians of Mrs. Holloway, after being discharged as such guardian, brought a bill in equity before a judge of the first circuit court of Hawaii, for himself and as next friend of Mrs. Holloway and her two surviving children, against said C. A. Brown (Tr., 331), for the purpose of being restored as guardian and trustee and of having the title to the lands devised to Irene Li passed upon in order to determine who owned them and who had the right of possession.

Judd was granted formal leave to file said bill, by Circuit Judge Cooper, on April 7, 1894, "on behalf of Irene Haalou Li Brown, a married woman and George Li Brown and Francis Hyde Li Brown, minors, as their next friend, against Charles A. Brown for construction of the will of John Li, deceased, and other relief." (Tr., 96-97.)

The bill having charged Mr. Brown, among other things, with failure to make adequate provision for

his wife and with wasting the estate (Tr., 83-84), Mrs. Holloway requested Judd to discontinue the suit, and, on June 29th, a formal request for leave to discontinue it was filed in her behalf in the case. (Tr., 110.) August 1, she appeared before Judge Cooper and stated that she wished to discontinue it "as far as the personal matters are concerned", but did not want the whole case thrown out and would rather have a decision on the construction of her father's will and wanted to side with Judd, whom she referred to as "Uncle Frank". Thereupon the court allowed the plaintiff's five days in which to amend the bill, "The amendment to be such as to limit the question to the construction of the will of the late John H." (Tr., 132.)

The full report of these proceedings is as follows:

"Wednesday, August 1st, 1894.

Before COOPER, J.

C. L. CARTER, for Plaintiff. F. M. HATCH, for Defendant.

"The case is explained to Mrs. Brown by the Court and in answer to the Court states that she signed the discontinuance voluntarily, and as far as personal matters are concerned, I wish to discontinue, I do not want to have the whole case thrown out of court. I wish to have my father's will construed.

"In answer to Mr. Hatch:

I rather have a decision on the construction of father's will and after let Mr. Brown account, but have them two distinct matters

"In answer to C. L. Carter:

I would rather be with Uncle Frank in the matter of the construction of the will, I want to have both sides presented to the Court. I would rather have the property under Uncle Frank's charge.

"The Court declines to sign the decree, and allows plaintiff's five days in which to amend the bill, the amendment to be such as to limit

the question to the construction of the will of the late John Ii.

GEO. LUCAS, Clerk." (Tr., 132.)

It will be seen that so far from these defendants in error being prejudiced by having their mother remain with them as a party plaintiff in the first case, as they now contend, their counsel, their next friend and the court deemed it an advantage to them, inasmuch as it was clearly to their interest to have their mother claim that her estate was less than a fee simple.

AN ISSUE OF TITLE.

The pleadings in the first case presented an issue of title between the Brown children, their mother and their alleged guardians and trustees, as plaintiffs, and Charles A. Brown, the defendant. The former contended that an estate for life only was vested in Irene Ii Brown, with the custody of the estate vested in the alleged guardians and trustees and a remainder in the Brown children, while the latter contended that the entire estate was vested in his wife, Irene Ii Brown, in fee simple, with the use and custody vested in him. This was the issue pleaded and adjudged in the first Brown case.

August 10th, 1894, an amended bill was filed with the same parties as before, save that Sanford B. Dole (Judge Dole), alleging himself to be an administrator with the will annexed and guardian, joined as an additional party plaintiff.

Said amended bill contained among other allegations, the the following:

"10th. That since the discharge of the said A. F. Judd and Sanford B. Dole as guardians aforesaid, the said Charles A. Brown has had possession of the entire estate delivered to the said Irene Haalou li Brown and himself, the said Charles A. Brown as aforesaid, (and) has taken upon himself the entire control and management thereof and now claims the personal right to the exclusive use and appropriation of all the rents, issues and profits of the said estate and also the exclusive control and management thereof and contends that under and by virtue of said will no trust was created which survived the marriage of the said Irene Haalou li Brown and the discharge of the said guardians as aforesaid and under such contention utterly declines and refuses to allow the said A. F. Judd and Sanford B. Dole or either of them, to take possession of said estate or to assume the management and control thereof or otherwise to execute or carry out the trusts imposed upon the trustees named in said will and their successors.

"11th. That two children have been born to said C. A. Brown and Irene Haalou li Brown by the said marriage to wit, George li Brown, aged six and one-half years, and the said Francis Hyde li Brown, aged about six months.

"12th. That under and by said will provision was made for the children of the said Irene Haalou li Brown and also for the support of said Irene Haalou li Brown, *and it is important to obtain a construction of such provisions and the relative rights under said will of such minor children and the said Irene Haalou li Brown and the said Charles A. Brown and to the said estate, and to the income thereof, and the duties of the said trustees to the several beneficiaries aforesaid under said will.*" (Tr., 120-122; our italics.)

C. A. Brown answered said allegations as follows:

"And respondent submits and alleges that by the true construction of said will said Irene Haalou Ii Brown took an estate in fee simple in the land and other property devised to her in said will; that no valid trust was intended or created by said will; other than for the payment of the debts of said testator and for the guardianship of said Irene Haalou Ii Brown during her minority.

"TENTH: Defendant admits that since the discharge of said complainants as such guardians he has had possession of the entire estate devised to said Irene Haalou Ii Brown by said will; and has had the exclusive control and management thereof; and contends that under said will no trust was created other than one of guardianship during the minority of Irene Haalou Ii Brown. Defendant admits that he refused to allow the said complainants or either of them to take possession of said estate, or assume the management and control thereof; and he says that he has been in possession of said estate as the husband of said Irene Haalou Ii Brown in accordance with the rights and obligations imposed upon him by the law as her husband." (Tr., 128; our italics.)

The Hawaiian law, in force at the time the first Brown case was brought and determined, gave C. A. Brown the custody, rents, issues and profits of his wife's land. The controversy was as to whether his wife's estate was in fee simple as he claimed or for life with the remainder in the children and the right

of possession and management in Judd and Dole, as the plaintiffs claimed.

In *McCandless vs. John Ii Estate, Limited*, 11 Hawaiian, 777, 787-8, a decision rendered two years after the first Brown case was decided, it was held by the Hawaiian Supreme Court that C. A. Brown was entitled to the rents, issues and profits of these lands. Chief Justice Judd, who was the next friend of the defendants in error in the first case, wrote the decision in the *McCandless* case, while Justice Whiting, the qualified justice of the supreme court in the first Brown case, and Judge Cooper, who, as trial judge, heard the earlier stages of it and authorized the suit, as one for the construction of a will (Tr., 96-97, 132), sat with him in the *McCandless* case.

The opinion in the *McCandless* case, at page 787, reads:

"We first consider the legal status of C. A. Brown when he executed the agreement" (a cattle contract with *McCandless*). "He was in 1886 married to Irene Ii *who owned the land in question*. The Married Woman's Act was passed in 1888. Mr. Brown's status must be settled by the law in force in 1886, which was Section 1286 of the Compiled Laws: 'The husband shall, in virtue of his marriage, unless otherwise stipulated by express contract, have the custody, use and usufruct, rents, issues and profits of all property of a fixed and immovable nature belonging to his wife before marriage, or accruing to her after marriage; and he may, with her written consent, rent or otherwise dispose of the same for any term not exceeding the term of his natural life.' That *this vested right of the husband* was not affected by the subsequent act of 1888, see *Nam Chong & Co. v. Lau Kona*, 9 Haw. 373." (11 Hawaiian, 787-8; our italics.)

It will be observed that the finality of the Hawaiian supreme court's decision in the first Brown case was recognized by Chief Justice Judd and the supreme court. The decision says that Irene Ii "owned" the land in question! We cite it here because it holds, conceding that Irene owned the land, that C. A. Brown had the use, custody and profits of it. Whether or not she owned it was the issue in the first Brown case.

Continuation of the Statement of the First Brown Case.

October 24th, 1895, a hearing on the merits was had before Circuit Judge Cooper, who resigned his office before reaching a decision, and, on April 16, 1896, the matter came up before Judge Perry, who, *with the written approval of the attorneys for the plaintiffs*, as well as of those for the defendant (Tr., 141), reserved certain questions for the consideration of the Hawaiian Supreme Court. (Tr., 140-141.)

The questions so reserved were:

"1. Was a trust created in the property devised to Irene Ii by the will of her father John Ii?

"2. If such a trust was created is the trust still in force Irene having married, attained majority and had issue of said marriage, which issue still survives?

"3. If such a trust still exists is the interest of Irene Ii Brown under the same absolute or for life only?

"4. If such trust still exists is it such a trust that the court will upon the proper motion order an immediate conveyance of the property to Irene Ii Brown?

"5. *Has Irene Ii Brown, a fee simple title in said property, or is her estate one for life only?*

"6. Was an estate in perpetuity created by said will and if so was its effect to vest the estate absolutely in Irene li Brown?

"7. *If there are any remainders in said property are they vested or contingent and in what person?*

"8. *What legal and equitable estates have the several parties plaintiff and defendant under the will of John li and the circumstances shown by the pleadings and evidence?* (Tr., 140-1; our italics.)

Chief Justice Judd and Justice Frear, being disqualified to sit in the case, Justice Whiting, the remaining Justice of the Supreme Court, requested W. R. Castle and L. A. Thurston, members of the bar, to sit with him "*in hearing and determining*" the case. (Tr., 142-3.)

The court, as constituted, had jurisdiction "to Hear and Determine" the case.

There was ample authority for the Supreme Court "to hear and determine" the case, whether the questions were of law, or of fact, or of mixed law and fact. (See the statute respecting the "Jurisdiction and Powers" of the Supreme Court, appendix to this brief, pp. 92-93.) Moreover, every time a highest court decides a case on its merits it necessarily decides that it has jurisdiction to decide it, whether it says so or not. The fact that it does decide it is an adjudication upon its jurisdiction to decide it.

Clary v. Hoagland, 6 Calif., 685.

Cable v. U. S. Life Ins. Co., 111 Fed., 19, 32.

Washington Bridge Co. v. Stewart, 3 How., 413, 424-426, and

Grand Central Mining Co. v. Mammoth Mining Co., 104 Pac., 573, 576-577, citing the above cases.

See also *Forsyth v. Hammond*, below.

It was decided in the second Brown case that the Hawaiian supreme court had jurisdiction to decide the first Brown case.

Thurston being compelled to leave the Islands requested leave to withdraw from the case January 28th, 1897 (Tr., 145-146), and on the same day S. M. Ballou, one of the counsel for the plaintiffs, filed an affidavit in which he set forth:

"That the case has become one of great urgency on account of the following facts which he alleges upon information and belief, to wit: *that the decision of this case involves the question of whether the title to a large tract of land required by the projected Oahu Plantation is in Irene E. (li) Brown or in trustees; that the said Irene E. (li) Brown and her husband, C. A. Brown, on the belief that the title to the said land is in them have entered into an agreement giving one Lincoln McCandless a right to pasturage on the lands in question; that said Lincoln McCandless refuses to release said pasturage in order that a lease may be made to the projected Oahu plantation unless he is paid an exorbitant sum, to wit, the sum of Six thousand dollars per year, which sum Irene E. (li) Brown and C. A. Brown refuse to pay although offering said McCandless a liberal sum for the pasturage right covered by said agreement.*

"That the promoter and agents of the Oahu Plantation, to wit, J. F. Hackfield and Company, have informed the parties to this controversy that said controversy must be settled and a lease with a good title must be given forthwith, or the projected Oahu plantation will be abandoned entirely, which re-

sult would cause irreparable injury to all parties concerned in this controversy; that should the decision in this case reach the conclusion that the title to the land in question is in certain trustees, the said trustees could at once break the dead-lock now existing between the said Irene E. (li) Brown and C. A. Brown on the one hand and Lincoln McCandless on the other, by giving a valid lease to the projected Oahu plantation.

"That besides the threatened total abandonment of the enterprise there is danger that it may be postponed for one year on account of the pending controversy for the reason that certain pumps must be ordered at once if the plantation is to be started this year, and the agents and promoters of said plantation refuse to take any steps whatever until they are assured of the lease in question." (Tr., 146-147; our italics.)

It will be observed, incidentally, that the counsel who appeared for these Brown children *and their mother* suggested that a decision be rendered which would favor the children's interests, not the mother's. They urged that a finding that the title was in "certain trustees" be made, not that Mrs. Holloway had a fee simple title as was decided. It is seen again that continuing her as party plaintiff with the trustees and children was not to their disadvantage! The point was also pleaded in and necessarily passed upon by the decision in the second Brown case, as we shall point out when we come to it.

April 9th, 1897, Justice Whiting requested Paul Neumann, another member of the bar, to sit with him "in hearing and determining" said first case (Tr. 148) and at the same time issued a new request to W. R. Castle. (Tr., 149.)

May 4th, 1897, the Hawaiian supreme court filed its "decision"—judgment—in the case. It answered the first question reserved in the affirma-

tive, adjudging that a trust in the property devised to his daughter was created by the will of the testator; as to the second question, it decided that upon the devisee attaining majority, the trust became extinct; the third and fourth questions were held to require no answer in view of other rulings; as to the fifth question, the court adjudged:

“In answering the fifth question the Court concludes that Irene Haalou Ii Brown had an estate in fee simple in the property devised to her by her father’s will.” (Tr., 154, 155.)

As to the other questions reserved the court said:

“The decision of this court upon the preceding questions reserved renders it unnecessary to answer specifically questions numbered 6, 7, and 8.” (Tr., 155.)

No further proceedings appear to have been taken in the case because, under Hawaiian law, no further proceedings were necessary. The “decision”—judgment—disposed of the entire controversy upon its merits. It was the final judgment upon the title by the highest court of the Republic. The courts below, however, held, in the present case, that this judgment was not binding upon them, because of the absence of a “decree.” On this subject the Circuit Court of Appeals said:

“The next objection to the case is we think final and conclusive, and entirely eliminates the first case from the controversy as a judgment and as the basis of a judgment in the second case to which we will refer presently. The objection is that after the opinion was filed in the Supreme Court answering the reserved questions no further proceedings

were taken in the case. The answers to the questions were not returned to the court below and no directions given to that court as to further proceedings and no decree has been entered in either court in the case. The case is still pending undetermined in the Circuit Court without force or binding effect upon the defendants in error. In the absence of a decree the decision of the court is not binding." (Tr., 416-7.)

Judge Dole reasoned along similar lines and reached the same conclusion. Both courts cited a number of cases (none from Hawaii), including *Oklahoma v. McMaster*, 196 U. S., 529, holding that findings of facts, verdicts of juries and the like are not judgments and will not support the defence of *res judicata*. But we submit that the cases cited are not applicable here; the question is one of "pure form." (*Kalanianaʻoli v. Smithies*, 226 U. S., 462.) It is governed by Hawaiian law, where the verdict of a jury even has been held a complete estoppel in a law action. (See *Rose v. Smith*, 5 Hawaiian, 377, 379-80.) The two Brown cases are an important part of the law of Hawaii. But aside from those decisions, it is clear that the Hawaiian law did not require a technical "judgment" or "decree." The Supreme Court "decision" was itself the judgment. The Hawaiian Legislature recognized this, for it recited in the Submission of Causes act that the record of a judgment in the Supreme Court should consist of the appeal papers and the "decision." No formal judgment or decree was essential under the Hawaiian law.

I.

THE "DECISIONS" OF THE SUPREME COURT OF THE REPUBLIC OF HAWAII WERE ITS JUDGMENTS AND THIS CONTROVERSY IS RES JUDICATA BY REASON OF THE DECISION OF THAT COURT IN THE FIRST BROWN CASE.

Said decisions, as in this case (Tr. 233), were signed by the justices, endorsed "decision" and ultimately reported in the official volumes as "decisions rendered" by the court. No formality, other than signing and filing the decision, was required. The "decision", with the appeal papers, was the "judgment" and the "record."

No judgment book was kept and no rule of court, even by inference, required any judgment, decree or record in the supreme court other than the decision itself, which was the judgment of that court. The third and fourth rules of the Hawaiian supreme court, in force at the time and the only ones that bear upon the subject, show that all that was required was for the justices to sign the decision and file it with the clerk, where it was to remain "separated from the papers in the original cause" and that was the end of the matter.

Said rules are as follows:

"III.

In causes where a new trial or other further proceedings are ordered to be had in the lower Court, an order to be signed by the Clerk, remitting the cause, must be prepared by counsel of the prevailing party within five days after receiving notice of the decision.

IV.

The bill of exceptions, or certificate of appeal, the decision of the Court together with the briefs of counsel, must be kept in the files of the Supreme Court, separated from the papers in the original cause."

(9 Hawaiian Reports 728.)

The full set of rules is copied in the Appendix to this brief, pages 93-95.

It was only in a case "where a new trial or other further proceedings were *ordered to be had* in the lower court" that even a "remitting" order was required; otherwise all the papers remained together as one case, the papers specified being "separated" from the others.

October 6th, 1900, (three years after the Supreme Court adjudged the first Brown case), new rules were published, the ninth and tenth reading:

"9. Remittitur. When a case is remanded to the lower court, an order to be signed by the clerk, remitting the cause, must be prepared and presented by counsel of the prevailing party within ten days after receiving notice of the decision.

10. Papers upon Remittitur. Upon a remittitur, the bill of exceptions, notice of appeal, decision of the court, briefs of counsel, and all original papers filed in the Supreme Court, shall unless otherwise directed by the court, be kept in the files of the Supreme Court. The other papers shall be returned to the lower court."

(12 Hawaiian Reports, pp. 443-444.)

These rules, which were in force when the second case was decided, made no substantial change in the old rules.

The Rules of the Hawaiian Supreme Court had the force of law.

Estate of Bernice P. Bishop, 5 Haw., 288, 290.

Paakuhu v. Komoikchuchu, 3 Haw., 642, 644.

Rev. Laws Hawaii, Sec. 1636, note:

The clerk of the supreme court was the clerk of the entire judiciary department; he was "*ex officio* clerk of all the courts of record" in the Islands and in "charge of the records, money and business in the central office in Honolulu." The "deputy clerks for the first circuit" were also "clerks of the Supreme Court", and there was one deputy clerk for each of the other circuits. (Laws 1892, chapter 57, sec. 39; Rev. Laws Haw. Sec. 1680.) There were no separate offices of the "Circuit Court of the First Circuit" and of the "Supreme Court of the Islands." It was all in the "central office" in Honolulu. When a case was taken to the supreme court the original papers went up; no copies were made, nor was the record printed; the policy was one of economy with a regard for substantial justice; matters of form were not highly regarded.

In *Paakuhu v. Komoikchuchu*, cited above, which by coincidence involved a tract of land claimed by John Ii, the supreme court of Hawaii referred to the "decision" of a single justice as "a decree." (3 Hawaiian, 646). It also said that an appeal not having been taken from the decision in time, "the whole matter was absolutely at rest." (3 Hawaiian, 642, 646.) That was the essential spirit of the Hawaiian law and practice. After a decision by the supreme court upon the merits, certainly until after the annexation of the Islands at least, the whole controversy was understood to have been put "absolutely at rest."

That the "decisions" were regarded as the substantial matter, operating as estoppels, and the judgments, if any, but formal incidents, is shown by the decision in *Rose v. Smith*, 5 Haw., 377, 379-380.

This case decided that where the clerk had failed to enter judgment on a verdict the supreme court would order the judgment entered, when the defect was noticed, *nunc pro tunc*; the court saying:

"The jury found, by their verdict" (in a first case), "in favor of Kaawihī, and judgment was entered thereon. But the Court granted a new trial. The case is reported in 3 Haw., p. 356.

"Upon a second trial on the same issue the verdict of the jury was in favor of Keoni Liaikulani, but no judgment was entered upon that verdict. Exceptions were taken, but were afterward withdrawn by the counsel for Kaawihī. It is claimed by defendant's counsel there is no judgment in favor of Keoni Liaikulani and that Kaawihī is not estopped by the verdict.

"We think that as the law makes it the clerk's duty to enter up judgment on a verdict (unless certain named proceedings are taken) the Court must now regard such entry as having been made, and may order it to be made *nunc pro tunc*.

"See *Tenorio vs. Brown*, 4 Haw., 665.

"We are aware that it was the practice of former clerks not to enter judgments forthwith, but to take time for them, often after the Court had adjourned for the term, and generally when exceptions were taken the judgment was not entered until the case was finally disposed of. Exceptions having been taken to this second verdict, entry of judgment was postponed and probably forgotten by the clerk.

"The principle that the adjudication of a question of pedigree will be binding, not only in the proceedings in which they take place, but in every other in which the same

question is agitated, was settled in *Keahi vs. Bishop*, 3 Hawn. 546 and has since been repeatedly affirmed.

"It would not be seriously contended that if judgment had been entered on the second verdict of the jury, Kaawilhi and his grantee, the defendant, would not thereby be estopped.

"The plaintiff, as the grantee of Keoni Liaikulani, must not be allowed to suffer by the act of the Court, and should be in no worse position by the failure to enter the judgment than if the judgment had been duly entered.

"We think the estoppel is complete and accordingly overrule the exceptions." (5 Hawn., 379-80.)

So in *Notley v. Brown*, 208 U. S. 429 (an Hawaiian case), it appears that the judgment was not signed in the trial court until the 8th day of June, 1905, when it was signed "as of the 28th day of January, 1903," the law allowing appeals to this court having gone into effect meanwhile. The matter was then taken to the Hawaiian supreme court for a second review, and, after a decision, was taken to this court which stated the proceedings in the Hawaiian supreme court upon the second review as follows:

"The court (the Hawaiian supreme court), reviewing the controversy, held that every substantial question in the case had been already disposed of when the case was previously before it on exceptions. Without specifically analyzing the assignment of errors based on the action of the trial court on June 8, 1905, in directing the clerk to sign the judgment which had been made out in pursuance to the order of the court on January 28, 1903, those assignments were, in fact, treated as irrelevant or without merit, since it was held that, as a necessary result of the previous action of the

court in finally disposing of the exceptions, judgment was required to be entered upon the verdict by operation of law on notice to the trial court of the overruling of the exceptions." (208 U. S., 437.)

The Hawaiian supreme court acted similarly in the second Brown case. It passed upon every question which it deemed worthy of discussion.

In the Notley case, referring to *Harrison v. Magoon*, 205 U. S. 501, this court, said:

"Five months after the decision just referred to in the Magoon case, what is styled a judgment was entered by the supreme court of Hawaii concerning the action of that court in quashing the writ of error from that court to the lower circuit court, previously referred to." 208 U. S., 439,

and at page 440, this court referred to the "so-called judgment of Sept. 27, 1907", in the Notley case and held that the decision of the Hawaiian Supreme Court, upon the merits of the controversy rendered prior to 1905, was the judgment.

For the purpose of supporting their attack upon the Decision in question, the Defendants in Error were forced to refer to it as an "Opinion" "rendered" by the court.

In the statement of claim of the respondents (defendants in error here) the decision in the first case is referred to as "the *opinion* of the Supreme Court of the Hawaiian Islands, rendered on the 4th day of May, 1897 (volume 11, Hawaiian Reports, p. 47)". (Tr., 49). So the decision in the second case is referred to by them as "the opinion of the Supreme Court of the Territory of Hawaii rendered on November 21, 1903 (Vol. 15, Hawaiian Reports page 308)", (Tr., 51), but the endorsement of the decision in the first case is, "Supreme Court Ha-

waiian Islands. A. F. Judd *et al.*, vs., C. A. Brown. *Decision*. Filed May 4th, 1897 P D. Kellett, Jr., Clerk:” (Tr., 158), while the “Certificate of Clerk, Supreme Court to Record in Brown *et al.* vs. Brown”, (Tr., 158) being the transcript of the supreme court record of the first case, offered in evidence by the defendants in error as “Exhibit 2” in the District Court below (Tr., 73), described the decision as, “*Decision of the Supreme Court rendered May 4, 1897*”. (Tr., 159.)

So too, the decision in the second case is endorsed: “Supreme Court Territory of Hawaii. George Ii Brown *et al.*, v. C. A. Brown.. *Decision*. Filed Nov. 21, 1903, George Lucas Clerk.” (Tr., 233), while in the certificate of the clerk of the supreme court, offered by the counsel for the defendants in error as “exhibit 4 for George Ii Brown and Francis Hyde Brown, respondents,” (Tr., 233-234), the decision in the second case is described as,—“2. *Decision of the Supreme Court rendered November 21, 1903.*” (Tr., 234.)

Turning to the title page of Volume 11 of the Hawaiian reports the contents of the volume will be found described as, “*Reports of Decisions Rendered by the Supreme Court of the Hawaiian Islands; Law, Civil and Criminal, Equity, Admiralty, Probate and Divorce. March 25, 1897, to April 20, 1899.* (The cases in this volume are published in the order of date of decision)”. It will be observed that while the words of the book are “*Decisions rendered by the Supreme court of the Hawaiian Islands*”, the statement of claim of the defendants in error reads, “*Opinion of the Supreme Court of the Hawaiian Islands rendered*” and so forth.

The decision itself, too, as reported at page 47 of the volume, reads, “Submitted April 9, 1897, *Decided May 4, 1897*”. So, too, Volume 13 in which the decision in the second case is reported, is entitled, “Cases decided in the Supreme Court of the

Territory of Hawaii, June 21, 1900, to January 2, 1902." It is true that the words "opinion of the court" appear beneath the syllabus in each of the decisions, as a heading to what follows, but that does not affect the essential character of the papers. They were the judgments, or constitutional "decisions," of the court.

In *Carter v. Mutual Life Ins. Co.*, 10 Haw. Rep., 559, 560, it is stated that the papers "which legitimately belong" to the supreme court, in a case determined upon a reserved question, are "the reserved question and the decision."

What constitutes a judgment of the Hawaiian supreme court was declared by the Hawaiian legislature as early as 1859 in an act still in force in 1903.

The statute prescribes the form of the judgment and record. It discloses, beyond controversy, what constituted a "judgment" and "record" in "ordinary civil actions" at the time the first Brown case was decided.

Sec. 1141. JUDGMENT IN WRITING. The justices, or a majority of them, shall thereupon hear and determine the case, and render judgment thereon, in writing, as if an action were depending.

Sec. 1142. ENTRY OF JUDGMENT; RECORD. Judgment shall be entered in such case, as in ordinary civil actions. The case, the submission, and the written decision, shall constitute the record." (Civil Code of 1859, secs. 1141-1142.)

These provisions continued in force in 1903. See Revised Laws, Sections 1749-1750.

What amounts to a Judgment is a Question of Local Law.

Washington A. & G. Packet Co. v. Sickels, 24 Howard, 333, 340.

Tippecanoe County v. Lucas, 93 U. S., 108.

This court takes judicial notice of the laws prevailing in countries acquired by the United States.

United States v. Perot, 98 U. S., 428, 430.

United States v. Chaves, 159 U. S., 452, 459.

The Federal courts, of course, also take judicial notice of the law of the jurisdiction in which they sit and so does this court on appeal. And where, as here, the language of a local constitution is comprehensive and the record accords with it, and the rules of court support the practice, and a statute declares the form of the judgment and record "in ordinary civil actions" to be that which was followed in these cases, it can hardly be seriously argued that the decisions were not in the form required by Hawaiian law. Yet the main point made by the courts below was that the decision in the first *Brown* case was not in proper form to constitute a judgment.

The decision in the first *Brown* case was an act of the prior government and entitled to credit as such.

The decision was that of the highest judicial tribunal of the former government, given at a time when there were no Federal Courts in Hawaii. It was an act of an independent branch of that government and a judicial construction of the *Ii* will upon which the title of the plaintiff in error was founded. In *United States v. Delespine*, 15 Peters 331, this court

said respecting a muniment of title from the former Spanish government of Florida:

"Furthermore, the authenticity of the testimonial made in Arrambide's behalf, at Havana, was sanctioned by the council of St. Augustine, in March, 1814; that was the tribunal to judge of its character as evidence; and having been treated as an existing and authentic act, this court cannot with any propriety at this day, hold otherwise; especially, as not the slightest suspicion attaches to the authenticity of the title papers, such as they are, found in the records."

In *Harvey v. Tyler*, 2 Wall., 328, 342, this court said, after referring to the general rule presuming the conclusiveness of the action of courts:

"There is, however, one principle underlying all these various classes of cases, which may be relied on to carry us through them all when we can be sure of its application. It is, that whenever it appears that a court possessing judicial powers has rightfully obtained jurisdiction of a cause, all its subsequent proceedings are valid, however erroneous they may be, until they are reversed on error, or set aside by some direct proceeding for that purpose."

The decision in the first Brown case was signed by those who constituted the court. (Tr., 158.) And it was decided in the second Brown case that it was the action of the Supreme Court of the Hawaiian Islands; also that it could not be collaterally attacked by these defendants in error, notwithstanding they were minors at the time the proceedings were brought and the decision rendered.

See also *Grignon v. Astor*, 2 Howard, 319, 341-342.

In *United States v. Davenport heirs*, 15 Howard, 7, this court held that it would accord the same

authority to the judicial acts of a prior government as that government itself would give. Is it conceivable that the government of the Republic of Hawaii would have questioned the validity of this decision of its highest court?

In *United States v. Percheman*, 7 Peters, 51, Chief Justice Marshall held that if private rights should be annulled by the new government succeeding the old Spanish Government, the whole world would be outraged. Still that is in effect what the courts below have done. Judge Dole of the District Court conceded that property and transactions amounting to at least half a million dollars of value would be affected by his decision and he knew that the John Ii Estate, Limited, acquired the property in question after the decision of the Hawaiian supreme court in the first case and in reliance upon it and that one of these defendants in error and the next friend or guardian of the other are retaining the shares allotted to them and collecting the dividends thereon. (Tr., 365-7.)

"The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property remain unchanged." (7 Peters 87.)

The same case holds that this court should be careful in examining the records and papers of foreign officers with whose powers and authorities it may not be well acquainted containing uncertain and incomplete references to things well understood by them but imperfectly understood by this court, before holding such officers have exceeded their powers.

The Matter is "Pure Form". (Kalaniana'oli v. Smithies, 226 U. S. 462.)

In *Adams vs. Yazoo & M. V. Railroad Co.*, 24 So. Rep., 317, 319 (a case taken to this court and affirmed, 180 U. S. 1), the Supreme Court of Mississippi, answering an argument that it had no control over its opinions after they were filed and the mandate had issued, said, "Both opinion and mandate are mere matters of practice" (24 So. 317); and, in answer to the argument that additions to the opinion were in violation of due process of law, said, "so far as due 'process of law is concerned', it is too obvious for discussion that it cannot be involved in mere matters of practice of the courts." (24 So., 319; see also 180 U. S., p. 9.)

The Mississippi court also said:

"This court of equal and co-ordinate dignity with the legislative and executive departments in matters judicial 'uttering the voice and registering the will of the State' is reduced to no such pitiable plight", as it would be if the argument made against the validity of its action were upheld.

To what a pitiable plight would the law and titles of Hawaii be reduced if the requirements of form demanded by the courts below in this case were to be upheld by this court? We have shown that no formal record of its judgments was required by the Hawaiian law, other than the signing and filing of its decisions.

Are all the "decisions" of the 60 odd years of the court's existence, to be disregarded whenever they are collaterally attacked by parties who have had their day in the highest court of the realm on the merits of their cases, simply because of a want of

that formality which other courts or countries have seen fit to adopt in recording their judgments?

The land titles of the country were all settled by awards of like informal character and it is impossible to say how far-reaching and unsettling would be a decision by this court upholding the judgments below.

The language of this court in *Damon v. Hawaii*, 194 U. S. 154, is in point. This Court said:

"A right of this sort" (a fishing right under Hawaiian law) "is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or *profit a prendre* as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. Moreover, however anomalous it is, if it is sanctioned by legislation, if the statutes have erected it into a property right, property it will be, and there is nothing for the courts to do except to recognize it as a right. *Wedding v. Meyler*, 192 U. S. 573-583." 194 U. S. 158.

In *Michigan Trust Co. vs. Ferry*, 228 U. S. 346, 354, this court said:

"It is a strong thing for another tribunal to say that the local court did not know its own business under its own laws. Even if no statute or decision of the supreme court of the state is produced, the probability is that the local procedure follows the traditions of the place."

The reopening of a controversy in one tribunal after adverse decisions in others of equal authority, especially in courts of the losing party's own choice, and upon issues affirmatively raised and pressed by the losing party, has never found favor in this court.

See *Minnesota Company vs. National Company*, 3 Wall. 332, 334, and *Forsyth v. Hammond*, 166 U. S. 506, 515.

II.

THE WORDS "FINAL AND CONCLUSIVE," WHICH ARE COMPREHENSIVE IN THEMSELVES, WERE INTENDED TO VEST IN THE HAWAIIAN SUPREME COURT AUTHORITY TO PUT EVERY CONTROVERSY BROUGHT THERE "ABSOLUTELY AT REST" (3 Hawaiian 646).

This is clear upon an examination of the reported decisions of the Hawaiian supreme court. It must have been the case with a court of last resort dealing with a mixed population, the rulers of which, at the time of the organization of the court and the inception of its forms of procedure, were, after all, little more than barbarian chiefs. Substance must inevitably have come to be all important, while any act of the clerk of the court must in their eyes have been of small consequence compared with the signatures of the justices upon the decision.

The earliest provision upon the subject is in the Constitution of 1840. That constitution is in the Hawaiian language and is the foundation upon which the English equivalent of the later constitu-

tions was constructed. The part immediately applicable is as follows:

"The decision of these" (the Supreme Court justices) "shall be final. There shall be no further trial after theirs. Life, death, confinement, fine and freedom from it are all in their hands, and their decisions are final."

Appendix to this brief, pages 89-90; (Fundamental Law of Hawaii, pp. 7 to 9; also Part 3 Hawaiian Investigation of the United States Senate Committee on Pacific Islands and Porto Rico, printed in 1903.)

The following cases from California and New York (contemporaneous with the Hawaiian Constitutions in English) construing the words "final and conclusive" give the most comprehensive meaning to said words.

Appeal of S. O. Houghton, 42 Calif., 35, 55.

Appeal of Birler, 65 Calif., 550, 556.

Tyler v. Connolly, 65 Calif., 28; 2 Pac. Rep., 414, 415.

McAllister v. The Albion Plank Road Co., 10 N. Y., 353, 355.

New York Central R. R. Co. v. Marvin, 11 N. Y., 277.

Matter of Canal and Walker Street, 12 N. Y., 406, 413.

McAllister v. The Albion Plank Road Co. was decided in 1852, the year of the first Hawaiian constitution in the English language.

III.

THIS COURT HAS UNIFORMLY HELD THAT IT WILL FOLLOW THE DECISIONS OF THE HIGHEST LOCAL COURTS AFFECTING TITLES AND CONSTRUING WILLS DE-
VISING LAND.

Messinger v. Anderson, 225 U. S. 436.

New Orleans v. Citizens Bank, 167 U. S. 371, 396-398.

Parrish v. Ferris, 2 Black, 606, 610.

Beauregard v. New Orleans, 18 How-
ard, 497.

Parker v. Kane, 22 Howard, 1.

Fairfield v. Gallatin County, 100 U. S. 47.

Bondurant v. Watson, 103 U. S. 281,
289.

Riddings v. Johnson, 128 U. S. 212,
224.

Haurich v. Patrick, 119 U. S. 156,
167-170.

*Bacon v. Northwestern Mutual Life
Life Ins. Co.*, 131 U. S. 258, 264-5.

*Tioga R. R. Co. v. Blossburg and C.
R. R. Co.*, 20 Wall., 137.

The opinion in *New Orleans v. Citizen's Bank* was written by the present Chief Justice, and, with the Parrish and Beauregard cases, is cited by Mr. Justice Holmes in *Messinger v. Anderson*, decided in 1912. Among other passages, the New Orleans case contains the following:

"In *Bank of United States v. Beverly*, 42 U. S. 1, How., 134-9, it was held that a con-

struction of a will affecting the rights of parties must govern in subsequent controversies between the same parties, without reference to the different nature of the demands." * * *

"And the law of Louisiana is exactly in accord with the rulings of this court, for as said by the Supreme Court of Louisiana in *Heroman v. Louisiana Institute of Deaf & Dumb*, 34 La. Ann., 814;

"'No principle of the law is more inflexible than that which fixes the absolute conclusiveness of such a judgment upon the parties and their privies. Whether the reasons upon which it was based were sound or not, and even if no reasons at all were given, the judgment imports absolute variety, and the parties are forever estopped from disputing its correctness.' Cooley, Const. Lim. 47 *et seq.*, and authorities there cited. Matters once determined in a court of competent jurisdiction may never again be called in question by parties or privies against objection, though the judgment may have been erroneous and liable, to and certain of, reversal in a higher court. Bigelow, Estoppel, 3d ed. Outline pp. lxi, 29, 57, 103. The estoppel extends to every material allegation or statement which, having been made on one side and denied on the other, was at issue in the cause, and was determined therein." 167 U. S. 396, 398.

The controversy passed upon by the lower courts here was whether Irene Li was devised an estate in fee simple or for life under her father's will. But that was "at issue in the cause," (in the first Brown case) "and was determined therein."

Since the "decision" in the first Brown case was a judgment, a constitutional "decision of the Supreme Court" of Hawaii, the courts below were clearly in error at the foundation. But, even as a part of the law of Hawaii (for the decision in the first case was upon the construction of the very

will before them), said decision ought to have controlled their action. It passed upon a will made before the change in the government and prior to the deed to the plaintiff in error. (Tr., 158, 70.) However, the defendants in error brought the second case for the express and determined purpose of having the proceedings and decision in the first case declared invalid as to them. It, too, was decided by the Supreme Court of Hawaii against them on the merits. We proceed to a fuller statement of it.

THE SECOND CASE, 15 HAWAIIAN 308.

January 27th, 1903, Alfred S. Hartwell, as counsel for the defendants in error, filed in the First Circuit Court of Hawaii a bill in equity in behalf of, "George Ii Brown and Francis Hyde Brown, Minors, By Their Next Friend Albert F. Judd, Plaintiffs". Upon said bill, the following order, of the same date, was endorsed, "Albert F. Judd is hereby appointed as next friend for George Ii Brown and Francis Hyde Brown, minors and plaintiffs herein, to prosecute this suit as such and protect their rights. J. T. DEBOLT, 1st Judge." (Tr., 161-182). The first and second paragraphs of the bill are as follows:

"1. That on the 2d day of May, A. D. 1870, John Ii, late of said Honolulu, died seized and possessed in fee of certain lands and personal property hereinafter mentioned, leaving a last will and testament, which was admitted to probate on the 10th day of June, A. D. 1870, as and for the last will and testament of said John Ii before a Justice of the Supreme Court of the Kingdom of the Hawaiian Islands, sitting in Probate, a copy of which will, with a translation thereof, is hereto appended as a part hereof and to the original whereof the plaintiffs, for greater certainty, crave leave to

refer; the lands herein referred to being mentioned in said will.

"2. That in and by said last will and testament, the same being written in the Hawaiian language, it was declared and directed by the said testator that if his daughter Irene, who is now wife of C. S. Holloway, of said Honolulu, and one of the defendants hereto, should die having borne children, then the said property should descend to her children, but that she, *the said Irene, should be his first heir, meaning and intending thereby that during her lifetime she should have the use and benefit of said property, and that her children, by virtue of said will, are the absolute owners in fee of said property, subject only to their said mother's life estate.*" (Tr., 161-2. Our italics.)

This allegation, it will be seen, again presented an issue of title.

The third paragraph alleged the marriage of Irene Ii to Charles A. Brown and the ages of George Ii Brown and Francis Hyde Brown and that they were living with said Irene, then Mrs. Holloway.

The fourth paragraph recited the filing of the bill in the first case on the 7th day of April, 1894,

"against the said Charles A. Brown, as defendant, by the said Irene, being then the wife of said defendant, and by her said children, by the next friend, A. F. Judd, and the said A. F. Judd, and Sanford B. Dole, as executors under said will of the said John Ii." (Tr., 162, our italics.)

There were also allegations as to the contents of the bill in the first case and that in said bill it was claimed that said Judd was trustee of "said property" during the life time of Mrs. Holloway and that *"the object of said bill" was*

"to obtain a construction of said will to establish the respective rights of said

children and of said Irene and of said defendant in said property and its income." (Tr., p. 163.)

The bill further alleged:

"That on the filing of said bill process of court issued and the said defendant appeared before Cooper, J., at Chambers, then a judge of said Circuit Court, and after sundry proceedings interposed by said defendant, said Cooper, J., on August 1, 1894, allowed the plaintiffs to amend their said bill, *'the amendment to be such as to limit the question to the construction of the will of the late John Li,'* and such amended bill was filed accordingly, and the said defendant filed his answer to said bill." (Tr., 163.)

The bill next recited the proceedings in the lower court in the first case, the reservation of questions for the determination of the supreme court, the requests to Castle and Thurston to sit with Justice Whiting, the affidavit of S. M. Ballou, one of the attorneys for the plaintiffs, that Thurston was about to leave for the United States and the case had become one of great urgency and the request to Neumann to sit instead of Thurston.

The bill next alleged:

"That April 9, 1897, at a hearing before the Supreme Court, in vacation, before Whiting J., Castle and Neuman, on said reserved questions of law, Kinney & Ballou appeared for plaintiffs, and Magoon and Edings for defendant, and that on May 4, 1897, *an opinion* by said Supreme Court organized as aforesaid, was *filed*, in which opinion *the court said* that *"the court decides that upon the marriage and attaining majority of the devisee the trust became extinct,"* and thereupon went on to say that *'the court concludes that Irene Haalou Li Brown has an estate in fee simple in the property devised to her by her father's will.'* The said court also in

said opinion, says that 'though it has consented to try the questions reserved in this cause, does not wish to establish thereby a precedent for reserving questions in a cause in equity.'

"That no decree has been made, filed or entered in any of the aforesaid proceedings in equity.

"That in none of the said proceedings did the said children, although having interests thereby affected conflicting with the interests of the said Irene, their mother, have separate attorneys or counsel, but that the same attorneys and counsel appeared therein for and represented said children, and their said mother." (Tr., 163-166; our italics.)

The bill then set forth the following:

"Wherefore, and by reason whereof, the plaintiffs' claim and submit that no legal adjudication has been made of said questions of law and that no court which was organized as required by the constitution of the Republic of Hawaii, obtained appellate jurisdiction of any of the said reserved questions of law;

"That the jurisdiction of said Supreme Court, concerning the construction of said will (if it ever existed), ended upon its determining that no trust was in existence concerning said property; that all matters of law arising in said cause before said Cooper J., and pending before him, were required by law to be decided, by him and by no other court or judge, and the same not having been decided by said Cooper, J., were not lawfully presented to or decided by any other court or judge;

"That there was no statutory or other authority to reserve questions of law in said cause for the opinion thereon of the Supreme Court, and that said reserved questions of law did not lawfully or properly come before said Supreme Court.

"Wherefore, said Supreme Court had no jurisdiction thereof.

"And the plaintiffs further claim and submit, that said Whiting, J., as a judge of the said Supreme Court, had no constitutional right or authority to request or authorize the said Castle and Thurston to sit with him as Justice of the Supreme Court in the places of two disqualified justices thereof;

"That after the said Supreme Court composed of said Whiting, J., and of said Castle and Thurston, had heard argument of said Reserved questions of law and taken the same under consideration, a new court to rehear said argument and decide said questions, upon said Thurston declining to join in an opinion thereon could not be and *was not lawfully organized*". (Tr., 166-7.)

We have italicised some of the essential allegations above because the same alleged jurisdictional defects in the proceedings and court in the first case, were repeated in this proceeding and afforded the basis of the decision of the courts below, disregarding the decision of the Supreme Court of the Territory which held, in said second case, that these defendants in error could not collaterally attack the Hawaiian Supreme Court's decision in the first case.

The remaining allegations of the bill set out the execution of a conveyance of the property by Mrs. Holloway and C. A. Brown on July 2, 1897, in trust for conveyance to a joint stock company to be organized,—one-third of the shares of the capital stock to be given to Charles A. Brown,—one-third thereof to the Brown children (the defendants in error here) and one-third to Mrs. Holloway; together with allegations of the conveyance of the property to the corporation and the issuance of the capital stock. (Tr., 167-8.)

The conveyance from Mrs. Holloway and Mr.

Brown to Henry Holmes, trustee, and by him to the plaintiff in error, as well as the John H will, with its translation, were annexed as Exhibits to the bill. (Tr., 170-181.)

The parties, plaintiff and defendant, in said second case were the owners of all the stock of the plaintiff in error. (Tr., 168.)

Mrs. Holloway, one of the defendants, answering the bill, alleged she was the owner in fee simple of the property which was the real subject of the controversy. (Tr., 185-186.)

Mr. Brown and Mr. Magoon, the other defendants, demurred.

The issue of *res judicata* was placed upon the record in the second case.

The first ground of Mr. Brown's demurrer was:

"That the matters set forth in the first and second paragraphs of said bill have been heretofore adjudicated between the said parties and a judgment made and entered adversely to the contention of said plaintiffs." (Tr., 188.)

The circuit judge sustained the demurrer of Mr. Brown, and in doing so, among other things, said:

"Plaintiffs" (that is the defendants in error here) "contend further that this court should construe the will now, and that upon proper construction thereof said defendant Irene only acquired a life estate in the property, and that her children, the plaintiffs herein, by virtue of said will, are the absolute owners in fee of the property, subject only to their mother's life estate." (Tr., 194-5.)

"Now, if the contentions and allegations of the plaintiffs are true that under the will the plaintiffs became entitled to a fee in the property in question, I cannot see how under this deed said property could pass or be conveyed, for in that case it would not be property belonging to either party. If the said Irene only held a life estate in the land, that estate would undoubtedly pass under the deed conveying all her right, title and interest in any lands in the Hawaiian Islands, but she certainly could not convey by deed property she did not own, and as the deed does not describe the property, I do not see how it could be claimed that a conveyance of the property she owned would cover property she did not own." (Tr., 196.)

The bill was dismissed by decree. (Tr., 198-9.)

The plaintiffs then moved to amend their bill, the motion to amend being:

"The plaintiffs move for leave to amend their bill as follows, viz.: By inserting therein, as paragraph '7' the following paragraph, to wit:

"7. And the plaintiffs aver that the said conveyance to said trustees and by said trustees to said corporation, were intended and declared by the respective grantors, as well as grantees thereof, to convey to said grantees respectively the fee simple of the lands named in said will as devised to the children of the defendant Irene, and that ownership in fee simple of said lands is claimed and exercised by the said corporation under and by virtue of said conveyances; that the said shares of the capital stock of said corporation were issued on the claim by said corporation of such ownership in fee and represent the value thereof, and also that it is claimed by the defendants that the said proceedings and decision of said Supreme Court are conclusive upon the plaintiffs and forever bar them from setting up any title under said will in the aforesaid lands.

And the plaintiffs further say that in consequence of said decision of said Supreme Court they have been deprived of trustees as provided under said will, whose duty it would be to preserve the plaintiffs' rights as remaindermen in said land and to see to it that no waste was committed upon the same or other injury done thereto to the plaintiffs' detriment as such remaindermen, and otherwise to protect the plaintiffs' interest in the premises.

And the plaintiffs further say that unless the invalidity of said proceedings and decision of court and also the plaintiffs' titles herein claimed, shall be declared by the court, a cloud will rest upon the plaintiffs' title and their rights in said land as such remaindermen may be made subject to costly and difficult litigation.

And plaintiffs further move for leave to amend their prayer in said Bill by inserting after the word 'require' in the fourth paragraph thereof, the following:

"And specifically that a declaratory decree be made declaring that the proceedings, decision and conveyances herein mentioned are invalid and of no effect as against the plaintiffs." (Tr., 199-201; our italics.)

Here the decision in the first case is referred to as a "decision."

The bill in this second case, as originally framed, referred to the decision of the Hawaiian supreme court in the first case as an "*Opinion*" (see Tr., 166.) But, it will be noticed that the amendment (which was filed after the argument and first decision of Circuit Judge Gear) refers to "*said proceedings and decision of said Supreme Court,*" and asserts that the defendants claimed that the same were "conclusive upon the plaintiffs."

It is apparent that the learned counsel for these defendants in error in said second case did not,

after the argument on the demurrers to the bill as originally framed, attach importance to his allegation, "That no decree has been made, filed or entered in any of the aforesaid proceedings in equity," but took the view that unless he could show jurisdictional defects in the proceedings or constitution of the supreme court which would render the decision wholly void, so that these defendants in error could collaterally attack it, they would be forever concluded from claiming an estate as remaindermen under the will of John li.

The amendment was verified by the oath of A. F. Judd and signed by Alfred S. Hartwell as counsel. General Hartwell also filed an affidavit in support of the motion for the allowance of the amendment, as follows:

"Personally appeared Alfred S. Hartwell, who on oath deposes and says: That as attorney and counsel for the plaintiffs he prepared and drafted their Bill of Complaint herein, and that until the opinion herein filed by His Honor George D. Gear, it had not occurred to this deponent that the said Bill of Complaint would be taken (as) otherwise than as showing that the conveyances therein referred to were intended and declared by the respective grantors as well as grantees thereof, to convey to the said grantees respectively the fee simple of the lands named in said will as devised to the children (being the plaintiffs) of the defendant Irene, or that the said Bill did not show by clear inference that ownership in fee simple of said lands is claimed and exercised by the said corporation known as the John li Estate, Limited, under and by virtue of said conveyances, or that the said shares of the capital stock named in the bill were issued otherwise than on the claim of said corporation of such ownership in fee and representing the value thereof, *but that since reading the said opinion de-*

ponent has felt that it would be for the interests of the plaintiffs to present more fully and specifically the matters stated in the proposed amendment of the bill herewith filed with a view of presenting the plaintiffs' case in a form more likely to bring it under the quia timet jurisdiction in equity, or as a case for alternative relief; and that this deponent believes that the proposed amendment is material for that purpose." (Tr., 203-4; our italics.)

The alternative relief prayed for by the amendment was for a decree declaring the proceedings and decision in the first case invalid as to these defendants in error, on the theory that the same were a cloud upon their alleged title.

The amendment was allowed by Judge Gear (Tr., 205) and was thereupon filed. (Tr., 206-9.)

Mr. Brown demurred again. His demurrer contained 12 separate grounds, arranged somewhat differently, but in substance the same as before. (Tr., 210-12.) The fifth and sixth grounds were:

"5. That it appears on the face of the said bill of complaint that the matters set forth in the first and second paragraphs of said bill have been heretofore adjudicated between the said parties and a judgment made and entered adversely to the contention of said plaintiffs.

"6. That it appears on the face of said bill of complaint that the plaintiffs have no right, title, interest or estate in and to any of the property described or referred to in said bill." (Tr., 211.)

Thus there was presented not only the issue of *res judicata*, but an issue of title as well. Mrs. Holloway answered admitting the allegations of the amendment. (Tr., 216.) Circuit Judge Gear again

sustained the demurrers and ordered the bill dismissed. His decision is as follows:

"Plaintiffs herein, by leave of Court filed their amended bill, setting out, by way of amendment, that the deed attached to the original bill which purported to convey all the property of Irene li Holloway and C. A. Brown, situated in the Hawaiian Islands, and 'owned' by them was 'intended and declared' by them as well as by the grantees to convey to said grantees the fee simple of the lands named in the will of John li as devised to the children of said Irene, and that 'ownership in fee simple of said lands is claimed and exercised by the said corporation under and by virtue of said conveyances; that the shares of stock represent the value of the land and that defendants claim that the decision of the Supreme Court construing the will bars the children from setting up title to said lands under the will.'

"Plaintiffs claim that this casts a cloud upon their title which should be removed.

"The allegations in the amendment do not take the case out of the rules set out in the former decision rendered in this case upon demurrer to the original bill, unless the bill is now good as a bill *quia timet*.

"It has been held that the equity action of *quia timet* still lies, and that the jurisdiction of this action in equity has not been taken away by the statutory action to quiet title.

" 'The statutory remedy is merely permissive and does not exclude or abrogate the remedy, if any, previously existing in equity.'

"Ahmi vs. Ashford, 12 Haw. 12, 13;

"Kahoivai vs. Limanu, 10 Haw. 509.

"But plaintiffs are not in possession of the land in question; at least it is not so alleged in the bill, and the allegation of the amendment as to the possibility of waste being committed would lead the Court to infer that plaintiffs are out of, and the defendants or their grantees, in possession of the land.

“The demurrer should have been sustained, as it was, because the bill did not show that plaintiff was in possession.”

“Ahmi vs. Ashford, 12 Haw. 13.

“If the allegations of the amended bill are true, as they must be taken to be on demurrer, the demurrer must be sustained as the plaintiffs have their remedy by an action to quiet title. In such an action the question is immaterial as to whether the plaintiffs are in or out of possession.” (Tr., 217-19.)

We have italicized the reasoning which the Hawaiian Supreme Court overruled before passing upon the principal contention made, namely, that the decision in the first case was invalid as to these defendants in error because of jurisdictional defects. The courts below held that the Hawaiian Supreme Court, on appeal, was limited to a re-examination of Judge Gear's reasoning.

The following decree was filed dismissing the bill: (Tr., 220-221) :

“The above cause having come regularly on to be heard upon the demurrers of the defendants Charles A. Brown and J. Alfred Magoon to the bill of complaint as amended on the 4th day of March, A. D. 1903, at ten o'clock in the forenoon of said day, Alfred S. Hartwell, Esq., appearing for plaintiffs, and Messrs. Hatch & Silliman, J. Alfred Magoon and Thomas I. Dillon appearing for the defendants Charles A. Brown and J. Alfred Magoon, and the Court having duly considered said matter and rendered a decision in writing herein sustaining the demurrers of said defendants Charles A. Brown and J. Alfred Magoon to the said amended bill of complaint;

“IT IS ORDERED, ADJUDGED AND DECREED that the said bill be and the same is hereby dismissed and the said defendants be and

they are hereby awarded their costs to be taxed by the Clerk.

"Dated this 12th day of March, A. D. 1903."

(We have italicised the part of the decree to which great importance was attached by the courts below. They held that it limited the Hawaiian supreme court to the questions considered by the trial judge.)

Decision of the Hawaiian Supreme Court in the Second Brown Case.

The plaintiffs appealed from the decree to the supreme court of the Territory (Tr., 224-5) which court, after holding the case under consideration for seven months, filed a decision affirming the decree dismissing the bill and remanding the case to the circuit judge. It did not agree with the reasoning of Judge Gear. It held "the statutory remedy to quiet title does not prevent the remedy in equity." (Tr., 229.) It then passed to the merits of the controversy and decided that the decision in the first case was not void and that it could not be collaterally attacked by the Brown children, notwithstanding they were minors at the time. On this it said:

"Without going into many of the questions of pleading, practice and jurisdiction raised by the defendants in this case, we take it that the plaintiffs cannot obtain the relief desired unless the decision in question is void. No fraud, accident, mistake or surprise is relied on. If the decision were only voidable equity could not act. Assuming that equity may relieve against a decision that is wholly void or even one that is void on its face, we must hold that the decision in question is not void. It could not be collaterally attacked. The main grounds on

which it is contended that the decision is void are: (1) that the Supreme Court which rendered the decision was composed in part of two substitute members in place of two disqualified regular members, but that under the Constitution not more than one substitute could sit; (2) that the decision was rendered upon reserved questions in equity at chambers but that the statute permitted the reservation of questions in court only, and (3) that there was no jurisdiction to construe the will after deciding that there was no longer any trust in existence. (1) It is at least doubtful whether the constitution (Const. 1894, Art. 83, sec. 1) did not permit the places of two disqualified members of the court to be filled with substitutes at the same time. The statute clearly did in terms at least. C. L., 1170. That has been the practice acquiesced in for years under the statute. The court was a *de facto* court and the decisions of a *de facto* court are not void and cannot be questioned collaterally. *Hind v. Wilder's Steamship Co.*, 14 Haw. 217. See also *Ninomiya v. Kapoikai*, *ante*, 273. (2) Granting that the Supreme Court did not have jurisdiction of reserved questions in equity (see *Booth v. Baker*, 10 Haw. 543, and the decision in question, in *Brown v. Brown*, 11 Haw. 47), still was the defect such as to make the decision absolutely void? The court had equity jurisdiction on appeals and it also had jurisdiction of reserved questions in law cases. *The defect lies in the method of bringing the question up to this court.* The questions were reserved by the Circuit Judge at chambers instead of in court. In our opinion it is not such a defect as renders the decision absolutely void. See *Hind v. Wilder's Steamship Co.*, *supra*, at page 219. (3) We may assume that according to the weight of authority equity should not entertain a bill solely for the purpose of construing a will although a number of courts hold otherwise, and this court has gone far in that direction (see *Hyde v. Smith*, 11 Haw. 535);

also that if the court in the former case had jurisdiction at first primarily because a trust was involved and only incidentally of the question of construction it should have declined to answer the latter question when it decided that there was no trust. Still, the decision would not be wholly void. It may have been erroneous without being void. *Those are questions on which courts differ. The practice is as determined by the courts in each jurisdiction.* If the decision was erroneous in these respects, it was mainly because there was an adequate remedy at law. But that was a matter that could be waived. See *Kaula v. Kaupahi*, ante, 391. *And this as well as the other alleged defects above mentioned could be waived on behalf of the plaintiffs, notwithstanding they are minors, at least so as to preclude a collateral attack by the minors.* See *Kingsbury v. Buckner*, 134 U. S. 650.

"The decree appealed from is affirmed and the case remanded to the Circuit Judge." (The full decision will be found in the appendix to this brief, pages 95-101; our italics.)

How did the Courts Below escape the Decision of the Supreme Court of the Territory?

The Circuit Court of Appeals, adopting the authorities and expanding the reasoning of Judge Dole (Tr., 346-347), said (Tr., 418-9) :

"From the decree" (of Judge Gear dismissing the bill as amended) "the plaintiffs appealed to the Supreme Court where the decree of the Circuit Court was affirmed. The Supreme Court agreed with the Circuit Judge that the bill" (as first filed) "was not maintainable on the ground that it was immaterial whether Irene took only a life estate or an estate in fee simple, inasmuch as she and her then husband purported in their

deed to convey only the lands belonging to them and their right, title and interest by courtesy, dower or otherwise in the lands of each other, and did not attempt to convey any lands belonging to their children, the plaintiffs, even if the latter had the remainder in fee in the lands in question.

"The Supreme Court also concurred in the opinion of the Circuit Judge with respect to the bill as amended holding that the amendments to the bill did not alter the result in so far as the bill might be considered to declare a trust. And considered as a bill to remove a cloud the Supreme Court agreed with the Circuit Judge that the court could not declare invalid as against a remainderman conveyances that on their face purported to convey the unquestioned interest, and only the interests, of the life tenants.

"The court then proceeded to consider whether the suit could be maintained to remove a cloud by reason of the prior decision. The court held with respect to the constitution of the court that the decision in the first case was by a *de facto* court, and that a decision of a *de facto* court was not void and could not be questioned collaterally; that granting the Supreme Court did not have jurisdiction of reserved questions in equity, still it was not such a defect as rendered the decision absolutely void and with respect to the jurisdiction of the court to construe the will after deciding that there was no longer a trust in existence the court held that the circuit court should have declined to construe the will after it had decided that there was no trust." (This, we submit, is somewhat over-stated and none too accurate. See pp. 56-57 above.) "Still", says the Court, "the decision would not be wholly void."
 * * * If the decision was erroneous in these respects, it was mainly because there was an adequate remedy at law. But that was a matter that could be waived. * * * And this as well as the other alleged defects above-mentioned could be waived on behalf

of the plaintiffs, notwithstanding they are minors, at least so as to preclude a collateral attack by the minors.' The decree of the circuit court was accordingly affirmed."

(To save any other reference to the opinions of the courts below and because this brief will be unavoidably long, we shall make such comments as we think required as we go along. The parts omitted from the decision of the Hawaiian supreme court, in the above abstract, we regard important. They dispose of the questions raised as matters of local practice and show that the decision in the first case was consistent with that practice.)

"The fact that no decree was entered in the first case", the Circuit Court of Appeals say, "was not mentioned by the Supreme Court in the second case, and the effect of the absence of a decree in the first case was therefore a question, and as we view it, an important question, not passed upon or in any way adjudicated in the second case."

It will be noticed that the Circuit Court of Appeals falls back upon the absence of a formal decree in the first case and considers that the lack of discussion of the point by the Supreme Court of the Territory is a justification for ignoring the decisions of both courts. But we submit that, as we have already pointed out, it is apparent on the face of the record in the second case that after the argument of the demurrers to the original bill the able counsel for the Brown children regarded the absence of a decree in the first case unimportant. In the amended bill he attacked the "proceedings and decision" in the first case, with a view to having them declared invalid for jurisdictional defects in the foundation of the suit and in the organization of the Hawaiian supreme court. The point was not withdrawn, however; on the contrary it was retained as an allegation of the bill as amended.

The bill, both as first filed and as amended, contained the allegation "*That no decree has been Made, Filed or Entered in any of the aforesaid Proceedings in Equity.*" (Tr., 166.)

The matter was therefore adjudicated when the decree dismissing the bill in the second case was affirmed by the Hawaiian supreme court on the merits. "*Back of the reasoning of the Court was the fact of its decision.*"

Forsyth v. Hammond, 165 U. S. 506,
515, 518.

The fact of the Hawaiian Supreme Court's decision is that it ruled directly, upon the pleading of these defendants in error, that the decision in the first case was valid as to them. The Hawaiian Supreme Court said of the decision, "It could not be collaterally attacked." Surely, it could be collaterally attacked unless it was, under Hawaiian law, a judgment. When the Hawaiian Supreme Court decided that the decision in the first case could not be collaterally attacked, it decided in effect that said decision was a judgment. The point was therefore passed upon, but even had it not been covered by the language used, it would have been concluded since the decision passed squarely upon the merits of the contention that the Brown children were not bound by said decision.

Continuation of the Quotation from the Opinion of the Circuit Court of Appeals.

"What the Supreme Court did in the second case", that court say, "was to affirm the decree of the Circuit Court. That decree had been entered upon the specific grounds set forth in the decree referring to the 'decision in writing herein sustaining the demurrers of the defendants.' The decision in writing" (of the trial judge) "to which reference was made" (in his decree) "sustained the demurrers to the bill of complaint

on the ground already stated, that the bill did not state a case entitling the plaintiffs to relief in equity.

"(1) Because the deed of conveyance executed by Irene and her husband referred to in the bill of complaint did not purport to convey lands belonging to the plaintiffs, and

"(2) The bill did not show that plaintiffs were in possession of the land in controversy.

"These objections" (of the trial judge) "went only to the frame-work of the bill under certain well known rules of procedure and not to the merits of the case. A more imperative rule requires that the merits of the case shall not be sacrificed to formal defects in practice or pleadings, and hence it is that such a decision is limited to the actual questions involved.

"Where a decree refers to the 'opinion of the trial judge in terms that make it clear that the object was to refer to it to explain what was determined, and the reasons therefor, then such opinion becomes legitimately a part of the record, and must be looked to, to explain what was in issue, and what was determined by the judgment or decree in question'. *Leyraud v. Rickey's Adm'r.*, 3 S. E. 864." (Tr., 419-420.)

The decision in the case cited and from which the quotation is taken supports neither the reasoning nor the conclusion of the Circuit Court of Appeals. It is diametrically opposed to both. Nevertheless it is made to do yeoman's service in support of the next remarkable, but inverted, proposition, namely, "It follows from the rule that the opinion of the Appellate Court" (the Hawaiian Supreme Court) "affirming such a decree" (one in which the trial court refers to his reasoning) "is inadmissible to show that the question determined by the trial court was different from that

embraced in its" (the trial court's) "decision. *Robinson v. N. Y. Co.*, 18 N. Y. Supp. 728, 730; *Penouilh v. Abraham et al.*, 9 So. 36; *Ohio River R. Co. v. Fisher*, 113 Fed., 840, 841." (Tr., 421.)

The real question ought to have been, not what were the grounds of the trial judge's decision, but what was the decision of the Supreme Court upon the grounds of demurrer stated in the record. None of the cases cited were upon the effect of a decision rendered upon an appeal from a decree entered upon a demurrer except the *Ohio River Company* case. In that case it is stated that the Appellate court's decision was conclusive upon the points "raised in the pleadings and necessarily involved" in the appellate court's decision.

The Hawaiian supreme court over-ruled the principal ground of the lower court's decision in the second *Brown* case, while affirming its decree on other grounds. If the rule of the Circuit Court of Appeals is right it means that, although in fact overruled by the highest court, upon the grounds stated in the trial court's decision, the decree is nevertheless affirmed on those grounds. It was in fact affirmed, and if the lower court's decision is the only one that can be looked to to see upon what grounds the case was decided, it follows that the lower court's grounds and not those of the Supreme Court were the law of the case. The position is manifestly unsound. It is as wrong in logic as it is in law. All of the grounds of demurrer are part of the record and were properly before the Hawaiian supreme court. One of those grounds, as pointed out, was that the controversy was *res judicata*, by reason of the decision in the first case, which was pleaded in the bill.

The point has been directly passed upon by this court.

Riddings v. Johnson, 128 U. S. 212, 218.

In Hawaii it has never been doubted, even in a law action. In *Harrison v. Magoon*, 13 Hawaiian, 339, 346, as well as in this second Brown case, grounds of demurrer other than the ones passed upon by the trial court were passed upon by the supreme court as matter of course.

The opinion of the Circuit Court of Appeals next states some general propositions of law with which we find no special fault except as to the application made.

"Where a demurrer is sustained for want of equity," they say, "the estoppel extends only to the precise point presented by the pleadings and decided by the ruling upon the demurrer. *Dennison Mfg. Co. v. Scharf Tag, Label & Box Co.*, 124 Fed. 313, 318; *Wiggins Ferry Co. v. Ohio & Miss. Ry. Co.*, 142 U. S. 396, 410. A decree sustaining a demurrer is no bar to subsequent proceedings upon facts and questions of law not litigated or passed upon by such decree. *Detrick v. Sharrar*, 95 Pa. St. 524, 525. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit. *Hughes v. United States*, 71 U. S. 232, 237; *Converse v. Davis*, 90 Tex. 462." (But there was no such disposition of the second Brown case by the Hawaiian Supreme Court. It was disposed of by that court upon the main point pressed.)

The Circuit Court of Appeals concludes the discussion with its palpably erroneous principle of the subordination of the supreme to the circuit court of Hawaii as the cornerstone of its action in affirming the judgment of the district court below.

"If the decision of the Supreme Court in the second case", it says, "be thus limited to the question considered and determined in the trial court, as it must be so limited under the authority of those cases", (there

was but one case that even approximated similar facts and in that case the decision reached was diametrically opposite to the conclusion of the Circuit Court of Appeals) "what were the questions left open for consideration and determination in any subsequent case? Manifestly any question involving the merits of the case, and primarily whether the absence of a decree in the first case in either the Circuit Court or Supreme court of Hawaii leaves the questions involved in that case open for adjudication in this case. In considering the record in the first case we were of the opinion that it did, and since we find nothing in the second case to change that opinion we might hold upon this fact alone that plaintiff's claims in this case are open to consideration and determination upon the merits, but the plaintiff in error contending for the bar of the second case upon the broad grounds that the questions there decided constituted in and of themselves an adjudication upon" (decision of) "the questions decided, we will consider briefly the remaining questions in the second case.

(1) Whether in the first case the Supreme Court had jurisdiction to answer the reserved questions of fact as to the intention of the testator John Li in devising an estate to his daughter Irene and to her children. In the second case the Supreme Court conceded that the Supreme Court in the first case had no such jurisdiction citing *Booth v. Baker*, 10 Haw. 543, 546, but held that the defect was not such as to make the decision absolutely void." (Tr., 420-421.)

This, we submit, is not an accurate statement of the court's decision. It is true it used the words, "granting it did not have jurisdiction of reserved questions in equity", but that was but a mere argumentative concession. The real decision was that

there was but a defect in the method of procedure. For the Hawaiian Supreme Court went on to say:

"The court had equity jurisdiction on appeals and it also had jurisdiction of reserved questions in law cases. The defect lies in the method of bringing the question up to this court. The questions were reserved by the Circuit Judge at Chambers instead of in court. In our opinion it is not such a defect as renders the decision absolutely void. See Hind v. Wilder's Steamship Company, supra at page 219." (Tr., 231-2.)

The Hind case (14 Hawaiian Reports, pages 215 to 231) contains a full consideration of the difference between defective procedure and want of essential jurisdiction. Full consideration of the question in that case may, perhaps, account for the summary disposal of it in the Brown case. The court may have deemed it unnecessary to do more than refer by citation, to its discussion in the earlier case.

The Hawaiian Supreme Court, in the first Brown case, took jurisdiction and decided the case on its merits. It treated the method of bringing the case before it as a mere irregularity. It stated that its action, in deciding the case, was not to be taken as a precedent permitting the reservation of questions in equity cases. The Supreme Court of the Territory, in the second case, said in substance, the same thing, that it was at most but an irregularity. The Circuit Court of Appeals observed that the supreme court of the Territory had in fact decided that the Supreme Court of the Republic had authority to dispose of the case, for it went on to say:

"This decision" (of the Supreme Court of the Territory) "is clearly not binding upon the Federal court. If the Supreme Court" (of the Republic) "had no jurisdiction to answer a reserved question of fact

its answer to such a question was absolutely void. *County Commissioners of Hampshire*, 140 Mass., 181, 182; *Bearce v. Bowker*, 115 Mass., 129; *Terry v. Brightman*, 129 Mass. 535. The effect of lack of jurisdiction in a court is a question open for the determination of any competent court. It is a 'Well settled rule in jurisprudence that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon, and brought before the latter, by a party claiming the benefit of such proceedings.' *Williamson v. Berry*, 49 U. S. 495; *Guaranty Trust Co. v. Green Cove Railroad Co.*, 139 U. S. 137, 147; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 194." (Tr., 421.)

The citations do not support the application made of them. The Massachusetts cases are decisions on direct attack. The cases from this court merely state and apply the general rule that the jurisdiction of any court exercising an authority over a subject may be inquired into in any other court. But that refers to essential jurisdiction, not mere matter of procedure. The *Defiance* case states what we have argued here:

"The fundamental question of jurisdiction, first of this court, and then of the court from which the record comes, presents itself on every writ of error or appeal, and must be answered by the court, whether propounded by counsel or not."

But that relates to fundamental jurisdiction. Mere errors of procedure will not throw this court's decisions open to collateral attack! It was for the Supreme Court of the Republic in the first case to decide whether it had jurisdiction to hear and determine the questions reserved. As presently pointed out, the statute clearly gave that court the power.

The matter was merely one of procedure, of "practice of the court." It was "pure form." The Supreme Court did take jurisdiction and there was no higher court to pass upon its action. In the words of the Hawaiian constitution the decision was "final and conclusive upon all parties." The question was a judicial question; it related to the method of bringing records before it. The point was also pleaded and decided in the second case. But even if it were an open question, the Circuit Court of Appeals was wrong, for the terms of the statute, prescribing the "Powers and Jurisdiction" of the supreme court, gave it "*appellate jurisdiction to hear and determine all questions of law, or mixed law and fact, which shall properly be brought before it on exceptions, error or appeal duly perfected from any other court, judge, magistrate or tribunal according to law or by reserved question of any circuit court or judge.*" (L. 1892, c. 57, sec. 51, appendix hereto, pp. 92-93.)

Even if the language (which was surely broad enough to cover both *reserved questions of fact* and *reservations by a circuit judge*) was susceptible, when read with other statutes, of a more narrow construction than its words import, still it gave ample authority to render the decision attacked. The whole question was really one of construction and procedure not of jurisdiction. The courts below approached the question as though it were before them, for direct decision upon a writ of error and they disposed of it on mere dicta without any reference to the statute quoted above, and they disregarded the fact that the highest court of the Republic did actually take jurisdiction and decide the first case on its merits and that the highest court of the Territory held that these defendants in error could not collaterally attack said decision.

The Circuit Court of Appeals continued its state-

ment of "the remaining questions in the second case" as follows:

"(2) Whether the Supreme Court in the first case had jurisdiction to construe the will after having decided that there was no longer any trust in existence. The Supreme Court in the second case conceded that the court in the first case, after having decided that there was no longer a trust, should have declined to construe the will." (We submit that this is not a fair statement, the alleged concession was but an argumentative introduction to the real conclusion that the decision could not be collaterally attacked.) "The reason for this concession" the court of Appeals say "is not stated. But the only possible reason that could be stated was that the court did not have jurisdiction to decide that question; but the court held that this was an error, that it did not make the decision void, and that it 'as well as other alleged defects above mentioned' was a matter that might be waived by the plaintiff minors so as to preclude a collateral attack by them. The answer to this proposition is the answer to the next question. The third and last question was whether the Circuit Court or the Supreme Court had jurisdiction over the persons of the plaintiffs, notwithstanding they were not represented by separate counsel in a controversy in which their interests were in conflict with the interests of their mother Irene." (Tr., 421.)

(We have already shown that there was a hearing in court on the question whether Mrs. Holloway should remain as a party plaintiff in the case and that the court upon that hearing, at the instance of the counsel for the plaintiffs, held that the bill should not be discontinued as to her and ordered an amended bill filed limited to the construction of the will. We have also shown that the Brown children were not prejudiced by having their mother remain as a party plaintiff in the suit.

Furthermore, the point was expressly pleaded in the second Brown case.)

"We are of the opinion" the Circuit Court of Appeals say, "that neither the Circuit or Supreme Court obtained jurisdiction over the plaintiffs in the first case, and we do not find from the record that they waived the lack of such jurisdiction. It therefore appears that in the second case the Supreme Court held that the Court in the first case was without jurisdiction to determine the questions involved in the merits of the case." (The Hawaiian Supreme Court in fact held exactly the other way.) "The opinion of the court that this lack of jurisdiction did not render the decision of the court upon those questions absolutely void is not an opinion binding upon the Federal courts, and we do not concur in that opinion." (Tr., 421.)

That is the last stand. The decisions were there, each on the merits, one holding Mrs. Holloway had an estate in fee simple under her father's will, the other that these defendants in error could not collaterally attack the first decision. The only possible way to avoid them was to evade them.

Were the courts below right in doing so? Do the decisions of this court justify the want of credit accorded to the decisions of the Hawaiian supreme court? The decisions of the supreme court of the Republic were in that country as authoritative as the decisions of this court are here. The questions passed upon in this Brown litigation were mere judicial questions and the decision was as much entitled to recognition as if it had been made by this court in the forms established for it. It was protected by the treaty of annexation as well as by the decisions of this court.

Knight v. United Loan Association,
142 U. S. 161, 183-4.

The decisions of the supreme court of the Territory were nearly, if not quite, equally entitled to consideration at the time the second case was decided. The decisions of that court were then final as to all save Federal questions. Federal questions might have been taken to this court in proper cases, but in no case did the Circuit Court of Appeals have jurisdiction to examine the decisions of the Hawaiian Supreme Court for error.

IV.

THE DECISION IN THE SECOND BROWN CASE THAT THE DECISION IN THE FIRST CASE WAS NOT VOID AND COULD NOT BE COLLATERALLY ATTACKED BY THE DEFENDANTS IN ERROR WAS A DETERMINATION OF THAT FACT TO BE FOLLOWED BY THE COURTS BELOW. IT WAS, MOREOVER, THE DECISION OF THE HIGHEST HAWAIIAN COURT UPON CONSTITUTIONAL AND STATUTORY QUESTIONS, RESPECTING THE ORGANIZATION OF THE HAWAIIAN SUPREME COURT AND ITS JURISDICTION AND JUDGMENT AND WAS CONTROLLING UPON THE COURTS BELOW UPON THE QUESTIONS THEY ASSUMED TO PASS UPON.

See *Forsyth v. Hammond*, 166 U. S. 506, 515-525.

This case involved a tract of land in the city of Hammond, Indiana. The city instituted a proceeding against the owner of the land and the proceeding was decided in favor of the city. The remaining necessary facts appear in the quotation. This Court said,

"But after an adverse decree, she" (the owner) "insisted that it" (the first decision)

"was not only erroneous but void, and voluntarily commenced an action in the Supreme Court of the State to have that claim established. She invoked the jurisdiction of that court. She summoned the city of Hammond into that forum and there challenged the decree of the Circuit Court, challenged it for error and also for lack of jurisdiction. The questions both of error and of jurisdiction were certainly judicial in their nature and questions within the undoubted cognizance of the Supreme Court. She voluntarily sought its judgment. Can she, after its decision, be heard in any other tribunal to collaterally deny the validity thereof? Does not the principle of *res judicata* apply in all its force? Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? The question is not whether the judgment of the Supreme Court would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other forum. The principles controlling the doctrine of *res judicata* have been so often announced, and are so universally recognized, that the citation of authorities is scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions." (Citing *Cromwell vs. Sac County*, 94 U. S. 351, and five other cases decided by this court) 166 U. S. 517-518.

The first Brown suit was instituted by Chief Justice Judd (by express leave of court, transcript 96, 97) as next friend of Mrs. Holloway and the Brown children, and also as executor. After it developed that Mrs. Holloway had some objection to the bill as framed, she was brought into court and testified

that she wished to side with Chief Justice Judd in the matter of the construction of the will (Tr., 132), his position and interests being identical with those of the children who also remained as parties plaintiff. (Tr., 117.) The court allowed her to remain and ordered the filing of an amended bill to be limited to the question of construction alone. (Tr., 132.) All of the litigation involved the land in controversy here and other land, and in both of the prior suits and this proceeding the same claim, that the Brown children had an estate in remainder after an alleged life estate in Mrs. Holloway was set up and pressed earnestly upon the Court. The parties to all the litigation are essentially the same. They are contesting and recontesting the same issue. The decision of the supreme court of the Republic in the first case was in favor of the claim of the defendant, Charles A. Brown, that Mrs. Holloway had a fee simple title in the property in question, and adverse to the claim of all the plaintiffs that the Brown children had an estate in remainder therein.

The Brown children's next friends were not satisfied with that decision and a second suit, through Albert F. Judd, as next friend, also by express leave of court (tr. 182) was instituted against both parents, and all others owning any of the stock of the plaintiff in error for certain relief on the theory that the decision of the Hawaiian supreme court was void, but said second suit resulted in the dismissal of their bill. They then amended their bill for the express and declared purpose of obtaining a decision that the proceedings and decision in the first case were invalid as to them. (Tr., 207-8.) The bill as so amended was again dismissed and they appealed to the supreme court of Hawaii and pressed their argument that that court had jurisdiction of the controversy and ought to declare the proceedings and decision in said first case void as to them. The Hawaiian supreme court held that it had jurisdiction of the controversy; it

affirmed the decree dismissing their bill, deciding that the decision in the first case was not void and that it could not be collaterally attacked by these defendants in error. Afterwards in this condemnation proceeding, they asserted the same matters as a statement of claims. Were they not concluded by the prior litigations?

As to the identity of the allegations here and in the second Brown case, Judge Dole (p. 338 of the transcript) said:

"The contentions in the present case in relation to the first case as made by the briefs are similar to those raised in the second case, without including the fifth and eighth points *of the latter*, and with the additional point *by counsel of the Estate*" and so forth.

and, at page 348, he said:

"The object of the second case was to procure the reversal of the decision in the first case";

while the Circuit Court of Appeals said:

"In effect it" (the second case) "was a suit on the part of Irene's children to establish their rights as remaindermen in the estate of John II which the theory was had not been determined in the first case." (Tr., 417.)

That is exactly what was sought in the first case and again in this condemnation proceeding.

What was decided by the Supreme Court of Hawaii in the Second Case?

That court decided that the action of those who heard and decided the first case was the action of

the supreme court of the Republic of Hawaii. It intimated that the court was properly filled under the statute, but held that, whether properly filled or not, it was a *de jure* court and was, at least filled by *de facto* judges and hence was a *de facto* court and further held that the decision could not be collaterally attacked by these defendants in error.

The Decision was one which the Federal Courts should have followed even if merely Precedent.

In the Forsyth case this court also said:

"The construction by the courts of a state of its Constitution and statutes is, as a general rule, binding on the Federal courts. We may think that the supreme court of a state has misconstrued its Constitution or its statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions. In *Claiborne County v. Brooks*, 111 U. S. 400, 410 (28: 470, 474), it was said: It is undoubtedly a question of local policy with each state, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the state.'" 166 U. S., 518-519.

Seventeen additional cases decided by this court are then cited. It was said in *Norton v. Shelby County*, 118 U. S. 425, 440, one of them:

"On many subjects the decisions of the courts of a State are merely advisory, to be followed or disregarded, according as they contain true or erroneous expositions of the law, as those of a foreign tribunal are treated. But on many subjects they must necessarily

be conclusive; such as relate to the existence of her subordinate tribunals; the eligibility and election or appointment of their officers; and the passage of her laws. No Federal Court should refuse to accept such decisions as expressing on these subjects the law of the State."

This court in *Michigan Trust Co. v. Ferry*, 228 U. S. 346, 354, said, respecting the scope to be given an administrator's account:

"As there can be no doubt of the power of the states to give the larger scope to an account, which indeed is not illogical in view of the fuller modern development of the notion that an executor holds all the assets in a fiduciary capacity, the only question in any case is what the state has seen fit to do. Upon this question courts of other jurisdictions owe great deference to what the court concerned has done. *It is a strong thing for another tribunal to say that the local court did not know its own business under its own laws. Even if no statute or decision of the supreme court of the state is produced, the probability is that the local procedure follows the traditions of the place.*"

This court has repeatedly held that it will follow the decision of the Supreme Court of a Territory upon such questions.

Lewers & Cooke Limited v. Atcherly,
222 U. S. 285, 294.

Emilia Alzua v. Johnson, 231 U.
S. 106.

Gray v. Taylor, 227 U. S. 51, 57.

Treat v. Grand Canyon R. Co., 222 U.
S. 448, 452.

English v. Arizona, 214 U. S. 359,
361, 363.

Copper Queen Consol. Min. Co. v.
Territorial Board, 206, U. S. 474,
479.

Fox v. Haarstick, 156 U. S. 674, 679.

Norton v. Shelby County is quoted at length in *Hind v. Wilder's S. S. Co.*, 14 Hawaiian, 215, 225-7, which deals at length with *de facto courts*, and which in turn is cited in the second Brown case.

See also

Gormley v. Clark, 134 U. S. 338; and
Wilson v. State of North Carolina,
 169 U. S. 586, 592, 3.

V.

THE DECREE IN THE SECOND CASE, AS AFFIRMED BY THE SUPREME COURT OF HAWAII, WAS A JUDGMENT QUIETING TITLE.

The bill was amended for the express purpose, as stated by the counsel for these defendants in error in that case, of bringing the suit "under the *quia timet* jurisdiction in equity". "Every possible interest" of the defendants in error was "cut off" by the decision of the Hawaiian Supreme Court on the merits of said controversy. The Hawaiian Supreme Court first decided that the lower court had jurisdiction of the bill as one to quiet title, as contended by these defendants in error, and it then held that they could not collaterally attack the decision in the first case which had adjudged that they had no interest in the property as remaindermen. That was the end of the whole controversy.

See *Northern Pacific Ry. Co. v. Slaght*, 205 U. S. 122, 131-132.

This case is pertinent. It was a judgment on demurrer in a suit to quiet title. This court, having stated that "a judgment on demurrer is as con-

clusive as one on proof", and, having referred to the difference between the effect of a judgment as a bar against the prosecution of a second action for the same claim or demand, and its effect as an estoppel in an action upon another claim or demand and to the distinction between personal and real actions, citing Herman's Estoppel, Sec. 92, further said :

"It is there said (in *Herman on Estoppel*) : 'Although there may be several different claims for the same thing, there can be only one right of property in it; therefore, when a cause of action has resulted in favor of the defendant, when the plaintiff claims the property of a certain thing there can be no other action maintained against the same party for the same property, for that would be to renew the question already decided; for the single question in litigation was whether the property belonged to the plaintiff or not; and it is of no importance that the plaintiff failed to set up all his rights upon which his cause of action could have been maintained; it is sufficient that it might have been litigated.'

"In *United States v. California & O. Land Co.* 192 U. S. 355, 48 L. ed. 476, 24 Sup. Ct. Rep. 266, this principle was applied. In that case a decree rendered upon a bill in equity brought under an act of Congress to have patents for land declared void, as forfeited, and to establish the title of the United States to the land, was held to be a bar to a subsequent bill brought against the same defendants to recover the same land, on the ground that it was excepted from the original grant as an Indian reservation. And, speaking of the two suits, we said, by Mr. Justice Holmes: 'The best that can be said, apart from the act just quoted, to distinguish the two suits, is that now the United States puts forward a new ground for its prayer (132). Formerly it sought to avoid the patents by way of forfeiture. Now

it seeks the same conclusion by a different means; that is to say, by evidence that the lands originally were excepted from the grant. But in this, as in the former suit, it seeks to establish its own title to the fee."

In this Brown case, Judge Dole, after conceding that the contentions in the present case in relation to the first case were similar to those raised in the second case (Tr., 338) pointed out a little farther on (p. 348) a single new ground of the old claim, namely that the original bill was signed, "A. F. Judd", and the amended bill was signed "A. F. Judd, Sanford B. Dole", and that the names of counsel were typewritten in both instances. And he cited certain cases where it was held on appeal that a bill in equity should be signed by counsel. The alleged defect was at best a mere defect of procedure, to be taken advantage of by motion in the first case.

VI.

THE WHOLE CONTROVERSY WAS PUT "ABSOLUTELY AT REST" (3 HAWAIIAN, 646) BY THE DECISIONS IN THE TWO PRIOR CASES.

Gila Reservoir and Irrigation Co. vs. Gila Water Co., 205 U. S. 279, 284:

"It is now contended," the opinion in the cited case reads, "that, inasmuch as the question is one of jurisdiction, neither the omission to call attention to the matter in the prior litigation nor the misrecital of fact operates to render the decree in that case *res judicata* upon the questions, but leaves the matter open for present inquiry. Coun-

sel are mistaken. In that litigation the present appellant was defendant. The property was in possession of the court, even if held under a prior receivership. The decree directed its sale. It was sold. The sale was confirmed, and the deed made, and property delivered to the purchaser. The appellant at least cannot now question the jurisdiction of the court in that suit, or the title which it conveyed to the purchaser at the sale. A failure to make a defense by a party who is in court is, generally speaking, equivalent to making a defense and having it overruled." 205 U. S. 284.

The "defense" which the losing party in the cited case failed to "present" was the alleged one of the court's jurisdiction. In the second Brown case these defendants in error did present that defense and had it overruled on the merits by the highest court having jurisdiction of the controversy and all of their essential contentions were expressly passed upon. This court also said in the cited case:

" 'This' (an argument that because orders were confused as to their titles, in the lower court) 'is tantamount to saying that the absence of formal orders by the court must prevail over its essential action. It is clear from the record that the district court considered the cases pending before it at the same time, considered No. 1996 as the complement of No. 1728, regarded the cases as in fact consolidated, and empowered the receiver appointed in 1728 to sell the property and distribute the proceeds as directed by the decree in 1996.' "

"Nothing further need be added to show that the case was rightly decided. The petition for a rehearing is denied." 205 U. S. 285.

The important fact in the case was that there had been an appeal to this Court from the orders attacked where the alleged jurisdictional defect

had not been presented and the district court's action had **been affirmed.** (205 U. S. 283, 284.)

What would the Supreme Court of the Republic of Hawaii have decided if this collateral attack on its decision in the first case had been made before the change of government?

VII.

THE SUPREME COURT OF THE TERRITORY WAS NOT LIMITED TO THE REASONS OR GROUNDS OF DECISION OF THE HAWAIIAN CIRCUIT JUDGE, AS HELD BY THE COURTS BELOW; ALL THE GROUNDS PRESENTED BY THE RECORD WERE BEFORE SAID SUPREME COURT UPON THE APPEAL FROM THE DECREE OF THE CIRCUIT JUDGE.

The courts below reached their decisions with this as an indispensable link in their arguments. No case is cited where the facts were alike and the case similarly decided. Cases supporting one part of the argument are cited with cases supporting the other part; but the two sets of cases, reasonable enough in themselves, are linked together to produce an unjustifiable result. The point was decided in direct contradiction of the law governing both the Federal courts and the courts of Hawaii.

In *McClung vs. Silliman*, 6 Wheat. 598, 603, this Court said:

"The question before an appellate court is, was the judgment correct, not the ground on which the judgment professes to proceed."

So the Supreme Court of Hawaii in *Colburn v. Holt*, 19 Hawaiian, 65, 66, in an appeal from the judgment of a district court upon a demurrer, said:

"The only point of law relied on by plaintiff being that it was erroneous to sustain the demurrers, the judgment will have to be affirmed if any of the grounds of the demurrers are well taken, that is, if the conclusion of the district magistrate was correct it must be affirmed irrespective of his reasons."

In *Riddings v. Johnson*, 128 U. S. 212, 218, this Court said:

"If there was nothing more in the case than the question of jurisdiction, we should be obliged to reverse the decree at once, and send the case back for further proceedings. But on an appeal in an equity suit, the whole case is before us, and we are bound to decide it so far as it is in a condition to be decided. The bill was dismissed on demurrer for want of jurisdiction. Though the court below may have erred in dismissing it on this ground, yet if we can see that there is any other ground on which it ought to be dismissed, for example, want of equity on the merits, we must affirm the decree. This makes it necessary that we should go into a further examination of the case made by the bill and supplemental bill."

In *Bierce vs. Waterhouse*, 219 U. S. 320, 332, a law case from Hawaii, this Court said:

"The right to have this judgment reviewed by this court involves the review of the judgment upon which the mandate issued, and necessarily brings here the first as well as the second bill of exceptions and transcript as one case. As it appears from the first bill of exceptions and the opinion and judgment in that case, that the plaintiffs in error in that case, the defendants in error here, had taken many exceptions to the judgment against them which were not passed upon by

the supreme court of the territory, it must follow that, if we shall find that that court erred in reversing the judgment upon the single error considered, that the other exceptions and errors not considered are now open for review, inasmuch as the judgment might have been reversible for other errors not considered. The practice adopted by the supreme court of the territory of passing without deciding other errors assigned upon a judgment is not approved, since it is likely to involve further review proceedings and duplicate appeals."

Other grounds than those passed upon by the trial court were considered and passed upon by the Hawaiian supreme court in the equity case of *Fowler v. Cotton*, 13 Haw. 487, 492, just as in this second Brown case. It must be assumed that the Hawaiian court knew its own practice. See *Michigan Trust Co. v. Ferry*, cited above. The lower courts cited no Hawaiian or Federal cases to the contrary.

VIII.

THE DEFENDANTS IN ERROR ARE BOUND BY THE JUDGMENTS IN THE TWO PRIOR CASES, NOTWITHSTANDING THEY WERE MINORS AT THE TIME SAID CASES WERE BROUGHT AND DECIDED.

That they were bound by the proceedings and decision in the first case, notwithstanding they were minors, was directly decided as the last word of the Supreme Court of the Territory in the second case.

Moreover, the ruling was clearly right both under Hawaiian and Federal Law.

Without arguing a matter that cannot be seriously controverted we call attention to the following:

The Hawaiian statute sanctioning suits in behalf of minors by their next friends is found in the chapter on "Guardians and Wards" (Rev. Laws of Hawaii, chap. 149), where it is provided :

"SECTION 2301. APPOINTMENT. Nothing contained in this chapter shall impair or affect the power of any court or judge to appoint a guardian to defend the interests of any minor impleaded in such court or before such judge, or interested in any suit or matter there pending, *or their power to appoint or allow any person as next friend for a minor, to commence, prosecute, or defend any suit in his behalf.*" (C. C. 1859, s. 1349; Cp. L. s. 1349; C. L. s. 1962; am. L. 1903, c. 16, s. 2.)

It was directly held in Hawaii, before the first Brown suit was brought, that an infant is bound by a decree in a suit to which he was a party by next friend.

Estate of Kealiiahonui, 8 Hawaiian
93, 100.

The same holding has been made by this court in the following cases :

Matter of Albert Moore, 209 U. S.
490, 496-500.

Kingsbury v. Buckner, 134 U. S. 650.

(The latter case was cited by Chief Justice Frear in the decision in the second Brown case.)

*Thompson v. Maxwell Land Grant &
R. Co.* 168 U. S. 451, 462.

IX.

REPLY TO POINTS OF THE DEFENDANTS IN ERROR.

The arguments in the courts below of counsel for the defendants in error upon the branch of the case

discussed in this brief may be summarized as follows:

1. That the decision of the supreme court of the Territory in the second case, which passed upon the jurisdictional defects alleged against the proceedings and decision in the first case, was not a bar to the claim of these defendants in error *because it did not pass upon the title to the land in question*, and, in holding that the decision in the first case could not be collaterally attacked by the defendants in error, it was a nullity.

2. That the decision in the first case was not a bar,

(a) because the court was not legally filled at the time the case was heard and decided;

(b) because the defendants in error were not parties *to the first case* since the amended bill was signed "A. F. Judd and Sanford B. Dole" and the defendants in error were not represented by separate counsel;

(c) because the Hawaiian Supreme Court had no jurisdiction upon reserved questions in equity;

(d) because no "decree" was entered in the first case;

(e) because the only question which the supreme court ought to have passed upon in said first case was whether a trust existed and the decision defining Mrs. Holloway's estate was collateral and not binding upon the parties; and, finally,

3. That the decisions were not binding upon the Federal courts.

As to the first case:

We have pointed out that the purpose of the first case, as shown by the Hawaiian Supreme Court

record, was to procure, a decision upon the title so that a valid lease for a long term of years could be made to the Oahu Sugar Company, that the question as to whether Mrs. Holloway's title was a fee simple or a life estate was placed upon the record by the pleadings, was essential to the controversy, was distinctly propounded to and directly answered by the Hawaiian Supreme Court. The defendants in error were parties to said controversy by next friend by order of court filed in the cause. Those from whom the plaintiff in error derived its title were also parties. There was therefore an adjudication of the controversy.

As to the second case:

We have pointed out that the essential purpose of said case, as shown upon the record, was to obtain a decision of the Hawaiian supreme court that the defendants in error were not bound by the proceedings and decision in the first case because of alleged jurisdictional defects in the constitution of the Hawaiian supreme court and in the proceedings in said first case. They pleaded every ground of attack, with one unimportant exception, which they are repeating here and the Hawaiian supreme court met their contentions fairly and squarely and decided that the Hawaiian supreme court was a legal court, that it had jurisdiction of the controversy and that its decision in the first case could not be collaterally attacked by them, notwithstanding they were minors when the suit was brought and decided.

We believe this disposes of all the contentions put forward by the defendants in error. Nevertheless we will further reply briefly, to each of said propositions.

**Brief answer to the points made by the
Brown Children in the Second Case
and Repeated by Them in This Pro-
ceeding.**

NO DECREE WAS MADE IN ANY SUCH PROCEEDINGS. (Trans. 335.)

The exact language of the children's bill of complaint, in the second case, with respect to this contention is as follows:

"That no decree has been made, filed or entered in any of the aforesaid proceedings in equity," (transcript, 166) meaning that no formal decree was entered in the first case.

We have shown that no "decree," was required by Hawaiian law after a "decision of the supreme court" unless that court ordered further proceedings in the lower court.

Moreover, the Brown children sought, in the second case, to have the decision in the first case adjudged void on that ground, but the Supreme court of the Territory, considered their contentions and the law of Hawaii and declared the Supreme court decision, in the first case, was not void and that it could not be collaterally attacked by the Brown children. The decision was also binding upon the Federal courts as a precedent declaring the law of Hawaii upon all of the points put forward.

A second point made by the Brown children in the second case and repeated by them in this proceeding was:

IN ALL SUCH SUCH PROCEEDINGS THE CHILDREN AND IRENE WERE REPRESENTED BY THE SAME COUNSEL, ALTHOUGH THEIR INTERESTS WERE CONFLICTING. (Transcript, 335.)

This contention having been made by the Brown children in the second case, (trans. 166) was necessarily decided by it. Moreover, it was a mere

irregularity to be taken advantage of by motion in the first case. A motion was made by Irene to have the first case discontinued as to her, but was resisted by the next friend of the defendants in error by his counsel, and after a hearing she sided with the next friend of her children and asked a decision in his favor.

CONCLUSION.

In conclusion, we submit that, as found by the District Judge, these defendants in error were "generously treated" by their parents when the plaintiff in error was organized to take over the fee simple title to the Ii lands to the end that an income producing lease might be made with the Oahu Sugar Company; that they have not "repudiated the transaction" by which they received in effect one-third of said estate in present enjoyment, but on the contrary have accepted the dividends therefrom ever since dividends were paid (certainly the one of age has); that "no fraud, accident, mistake or surprise is" or ever has been "relied on". (Tr., 230.) That the plaintiff in error acquired its title after the Hawaiian Supreme Court decision and in reliance upon it, not only as a judgment of the highest Hawaiian court binding on these defendants in error, but as an authoritative exposition of the John Ii will by the supreme court of the former government; that it is in violation of the judicial history of this country and the fixed principles of this court, for the Federal Courts to refuse to recognize such a decision as binding upon them; that said "decision" was in fact the judgment of said court, and as declared by all of the Hawaiian constitutions, "final and conclusive upon all parties"; that these defendants in error were parties to said case by reason of the order of court endorsed upon the summons and complaint, which was a part of

the record, making them parties and the further fact that their names appear in all proceedings as parties to the record and in the judgment rendered in the case; that those in privity with the plaintiff in error, Charles A. Brown, the defendant in said case, and his wife, Irene Ii Brown (now Mrs. Holloway), were also parties, and that all, including the plaintiff in error, were bound by the decision of the Hawaiian Supreme Court which was the judgment and the only judgment required to be given under the Hawaiian Constitution, statutes and rules of court; that the second case disposed directly of every objection of any importance urged against the validity and binding force of said decision in the first case as a judgment; that the Supreme Court of the Territory was at the time the second case was decided by it, the highest court to which that controversy could be carried; that it was there held, in a suit instituted by these defendants in error, that they could not collaterally attack the "decision" (the judgment) of the Hawaiian Supreme Court in said first case; and finally that all matters urged in support of the claims of these defendants in error have been disposed of by prior litigation instituted by them.

Wherefore we pray a reversal of the judgments of the courts below.

REUBEN D. SILLIMAN,
JOSEPH LAROCQUE,
CLARENCE BLAIR MITCHELL,
Counsel for Plaintiff in error.

APPENDIX.

I.

Part of Hawaiian condemnation statute.

SEC. 501. INTERVENORS. Any person in occupation of or having any claim or interest in any property sought to be condemned or in the damages for the taking thereof though not named in the complaint, may appear, plead, and defend in respect to his own property or interest, in like manner as if named in the complaint (L. 1896, c. 45, s. 11; C. L. pt. of S. 1551).

SEC. 502. DECISION. The court shall have power to determine all adverse or conflicting claims to the property sought to be condemned and to the compensation or damages to be awarded for the taking of the same (L. 1896, c. 45 s. 12; C. L. s. 1552).

II.

Parts of Hawaiian constitutions.

Constitution of 1849.

OF THE SUPREME JUDGES. The representative body shall appoint four persons whose duty it shall be to aid the King and Premier, and these six persons shall constitute the Supreme Court of the kingdom.

Their business shall be to settle all cases of difficulty which are left unsettled by the tax officers and common judges. They shall give a new trial according to the conditions of the law. They shall give previous notice of the time for holding courts,

in order that those who are in difficulty may appeal. The decision of these shall be final. There shall be no further trial after theirs. Life, death, confinement, fine, and freedom, from it, are all in their hands, and their decisions are final (Fundamental Law of Hawaii, pp. 8 and 9).

Constitution of 1852.

ART. 85. The Judicial power shall be divided among the Supreme Court and the several inferior courts of the Kingdom, in such manner as the Legislature may from time to time indicate.

ART. 87. The decisions of the Supreme Court, when made by a majority of the Justices thereof, shall be final and conclusive upon all parties. (Fundamental Law of Hawaii, pp. 165-6).

Constitution of 1864.

ART. 64. The Judicial Power of the Kingdom shall be vested in one Supreme Court, and in such Inferior Courts as the Legislature may, from time to time, establish.

ART. 66. The Judicial Power shall be divided among the Supreme Court and the several Inferior Courts of the Kingdom, in such manner as the Legislature may, from time to time, prescribe, and the tenure of office in the Inferior Courts of the Kingdom shall be such as may be defined by the law creating them.

ART. 67. The Judicial Power shall extend to all cases in law and equity, arising under the Constitution and laws, of this Kingdom, and Treaties made, or which shall be made under their authority, to all cases affecting Public Ministers and Con-

suls, and to all cases of Admiralty and Maritime jurisdiction.

ART. 69. The decisions of the Supreme Court, when made by a majority of the Justices thereof, shall be final and conclusive upon all parties (Fundamental Law of Hawaii, pp. 177-8).

Constitution of 1887.

ART. 64. The Judicial Power of the Kingdom shall be vested in one Supreme Court, and in such Inferior Courts as the Legislature may, from time to time, establish.

ART. 66. The Judicial Power shall be divided among the Supreme Court and the several inferior Courts of the Kingdom, in such manner as the Legislature may, from time to time, prescribe, and the tenure of office in the Inferior Courts of the Kingdom shall be such as may be defined by the law creating them.

ART. 67. The Judicial Power shall extend to all cases in law and equity arising under the Constitution and laws of this Kingdom, and treaties made, or which shall be made under their authority, to all cases affecting Public Ministers and Consuls, and to all cases of Admiralty and Maritime jurisdiction.

ART. 69. The decisions of the Supreme Court, when made by a majority of the Justices thereof, shall be final and conclusive upon all parties.) (Fundamental Law of Hawaii, pp. 191-192.)

The Constitution of 1894.

In force when the decisions in the two Brown cases were rendered.

ARTICLE 84.—SUPREME AND INFERIOR COURTS. The Judicial Power shall be divided among the Supreme Court, the Justices thereof, and the several Inferior Courts of the Republic in such manner as the Legislature may, from time to time, prescribe; and the tenure of office of the Judges of the Inferior Courts shall be such as may be fixed by the law creating them.

ARTICLE 85.—JURISDICTION. The Judicial Power shall extend to all cases in law and equity, arising under the Constitution and Laws of the Republic and Treaties; to all cases affecting Public Ministers and Consuls, and to all cases of Admiralty and Maritime Jurisdiction.

ARTICLE 86.—DECISIONS. The Decisions of the Supreme Court shall be final and conclusive upon all parties, when made by a majority of the Justices thereof or by a majority of those who constitute the Court as provided by law in case a Justice thereof is disqualified or absent. (Fundamental Law of Hawaii, pp. 233-234.)

III.

Section 1628 of the Revised Laws of Hawaii, being section 1164 of the Civil Laws of Hawaii and Section 51, Chapter 57, of the Laws of 1892, relating to the powers of the Supreme Court of the Republic of Hawaii.

SEC. 1628. JURISDICTION AND POWERS. The Supreme Court shall have appellate jurisdiction

to hear and determine all questions of law, or mixed law and fact, which shall properly be brought before it on exceptions, error or appeal duly perfected from any other court, judge, magistrate or tribunal, according to law or by reservation of any circuit court or judge; and original jurisdiction in all questions arising within writs of error, certiorari, mandamus, prohibition and injunction directed to circuit courts, or to circuit judges, or to magistrates, or other judicial tribunals, and returnable before the Supreme Court. The Supreme Court and the several justices thereof in aid of the appellate jurisdiction of the court shall have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and all other writs necessary or proper to the complete exercise of the appellate jurisdiction of the court, and each of the justices shall have original jurisdiction and power to issue writs of habeas corpus and may make such writs returnable before himself or the Supreme Court or before any Circuit Court or any judge thereof. (L. 1892, c. 57, s. 51; C. L. s. 1164.)

IV.

Rules of the Supreme Court of Hawaii (in force when first Brown case was decided.)

I.—Briefs must be filed within five days after oral argument unless further time is allowed.

II.—In cases submitted without oral argument, briefs must be filed on or before the adjournment of the term, unless further time is allowed. On

failure of both parties to comply with this rule the case will be stricken from the Calendar.

III.—In causes where a new trial or other further proceedings are ordered to be had in the lower Court, an order to be signed by the Clerk, remitting the cause, must be prepared by counsel of the prevailing party within five days after receiving notice of the decision.

IV.—The bill of exceptions, or certificate of appeal, the decision of the Court, together with the briefs of counsel, must be kept in the files of the Supreme Court, separated from the papers in the original cause.

V.—No paper shall be taken from the files of the Supreme Court, except by permission of a Justice thereof.

VI.—The Court will not hear any motion grounded on facts not verified by affidavit or the record.

VII.—District Magistrates in all cases in which appeals have been taken and perfected from them to the Supreme Court, shall forward without delay to the Clerk of the Supreme Court a certificate of appeal, stating the nature of the action, the decision made, and the points of law upon which the appeal is taken; also, the original summons or warrant, all vouchers and exhibits filed, and a transcript of the testimony; also, all costs paid by either party to the action, with a clear and itemized statement of the party by whom, and the purpose for which, each amount is paid, keeping back nothing but statutory fees and mileage, and stating explicitly what is kept back.

VIII.—Bonds for costs on exceptions or appeals to the Supreme Court shall be made to the Clerk

of the Supreme Court, and filed in the Court in which the appeal or exception is taken, to be forwarded by such court to the Supreme Court.

IX.—Attorneys shall be liable for costs of Court incurred by their respective clients.

X.—All applications for admission to the Bar of the Supreme Court or to the lower Courts, must state the character or term of study pursued by the applicant, and if he be from the Bar of the higher Courts of another jurisdiction the certificate of admission to such Bar must accompany the application. In all cases sufficient certificates of good moral character must accompany the application.

By the Court:

HENRY SMITH,
Clerk.

(9 Hawaiian Supreme Court Reports pp. 728-9.)

V.

Decision in the second Brown case, 15 Hawaiian, 308-313, Record, 233.

George H Brown and Francis Hyde Brown, Minors, by their Next Friend, Albert F. Judd v. Charles A. Brown, John A. Magoon and Irene H Holloway.

Appeal from Circuit Judge, First Circuit.

Submitted April 24, 1903. Decided November 21, 1903.

FREAR, C. J., GALBRAITH and PERRY, JJ.

"A devisee and her husband formed a corporation and conveyed all their lands to it through a trustee and stock was issued to her, her husband and her children respectively. Held, that, assuming that she took

only a life interest and that her children took remainders in fee by the devise, the latter were not entitled to have the conveyances set aside or to have the stock that was issued to the husband and wife transferred to a trustee to pay the income to the husband and wife for her life and at her death to assign it to the plaintiffs, even though the husband and wife claimed to have conveyed the fee, inasmuch as, for one reason the husband and wife purported to convey only their interests, whatever they were.

"The Supreme Court had previously decided that the first devisee took the fee under the will, but the children asked to have that decision declared void as to them on the grounds, (1) that the court was composed in part of two substitute members, although as contended, the Constitution allowed only one substitute, (2) that it rendered the decision on questions reserved by a Circuit Judge at chambers, although the statute allowed questions to be reserved only by a Circuit Judge in court, (3) that it could not as a court of equity go on and construe the will as to the quantity of estate devised after construing it to the effect that a trust created by it had terminated, and (4) that the rights of the plaintiffs who were infants could not be waived by their next friend. Held, that the decision was not absolutely void and could not be collaterally attacked even by the infants, and so could not be declared void as to them, even if equity could declare void or even enjoin the enforcement of a decision that was absolutely void on its face.

"OPINION OF THE COURT BY FREAR, *C. J.*

"This was originally a bill to declare a trust and for other incidental relief. It was alleged in substance that the defendants C. A. Brown and Irene I. Holloway, who were formerly husband and wife and are the parents of the plaintiffs, conveyed certain lands claimed to have come to the wife under her father's will to a trustee to convey the same

to a corporation to be formed; that the corporation was formed and the property conveyed to it; that one-third of its capital stock is held by the said Irene in the name of A. W. Carter, one-third by said Carter as trustee for the plaintiffs and the remaining third by said Brown, except as to one share, which is held for him by defendant Magoon; that certain proceedings were had in court, before said conveyances were made, in which it was decided that the said Irene owned said property in fee (see *Brown v. Brown*, 11 Haw. 47), but that said decision was void for want of jurisdiction, and that the said Irene had only a life estate; and therefore it was prayed that the said defendants be required to assign the stock held by them to a trustee in trust to pay the income of 500 shares thereof to said Irene for life and of another 500 shares to the said Brown for the life of the said Irene, and at her death to assign all of the said shares to the plaintiffs absolutely. The defendants Brown and Magoon demurred and the defendant Irene answered. The Circuit Judge sustained the demurrers on the ground that it was immaterial whether Irene took only a life estate or not, inasmuch as she and her then husband purported, as shown by the copy of the deed which was made a part of the bill, to convey only the lands belonging to them and their right, title and interest by courtesy, dower or otherwise in the lands of each other, etc., and did not attempt to convey any lands belonging to their children, the plaintiffs, even if the latter had the remainder in fee in the lands in question. In this we concur and so need not consider the remaining thirteen grounds of demurrer.

"The plaintiffs then amended their bill, upon leave granted, by alleging in substance that the parties to said conveyances claim that they conveyed the fee, that ownership in fee is claimed and exercised by the corporation, that the stock of the corporation was issued on such claims and represents

the value of the fee, and that the defendants claim that the said decision is conclusive on the plaintiffs; and also that in consequence of said decision the plaintiffs have been deprived of trustees as provided under the will, whose duty it would be to preserve the plaintiff's rights as remaindermen and otherwise protect their interests; and by praying that the said decision and conveyances be declared of no effect as against the plaintiffs. The defendants again demurred and answered respectively; the demurrers were sustained and a decree entered dismissing the bill. The plaintiffs appealed.

"It is obvious, as held by the Circuit Judge, that the amendments to the bill do not alter the result in so far as this may be considered a bill to declare a trust. The mere fact that the defendants claimed that Irene received the fee under the will assuming that she really had not, would not justify a decree that she did receive it or convey it or that the defendant should convey it or the stock, which might represent it if she or they had received it, to a trustee.

"The further question remains, whether the bill should now be sustained on the theory that it may be considered a bill to remove a cloud. The Circuit Judge held that equity could not give the desired relief because the plaintiffs were out of possession and so had a remedy at law—under the statutory action to quiet title. Ejectment of course would not lie because as remaindermen the plaintiffs would not have a right of immediate possession. *Sylvester v. Sylvester*, 83 Me., 46; *Turner v. House*, 199 Ill., 464. And the statutory remedy to quiet title does not prevent the remedy in equity. *Ahmi v. Ashford*, 12 Haw., 12.

"The alleged clouds are the conveyances and the decision—which it is sought to have declared invalid as against the plaintiffs. First, as to the conveyances. Assuming that the grantors had only a life estate, the conveyances would be valid to pass that and so

could not properly be declared invalid as to that. And, as to the plaintiffs' remainders, assuming that they had remainders, the Court could not, on the theory of removing a cloud, declare invalid as against remaindermen conveyances that on their face purport to convey the unquestioned interest and only the interest of the life tenants. A mere declaratory decree upon the construction of the conveyances, to the effect that they did not pass the fee is not asked for and could not properly be granted, if it were.

"Secondly, as to the decision. Of course, even if that could properly be declared of no effect as against the plaintiffs, it would still be true that no trust could be declared as to the shares of stock and yet it is somewhat doubtful if the plaintiffs can be considered as seeking a declaratory decree as to the decision alone, and, if they are, it is not clear on what theory they can rightfully ask for a decree merely declaring a decision to be of no effect as against them, without asking for an injunction or other relief, to prevent its enforcement. Equity does not act directly on judgments nor is it a branch of equity jurisdiction to merely construe judgments. Without going into many of the questions of pleading, practice and jurisdiction raised by the defendants in this case, we take it that the plaintiffs cannot obtain the relief desired unless the decision in question is void. No fraud, accident, mistake or surprise is relied on. If the decision were only voidable, equity could not act. Assuming that equity may relieve against a decision that is wholly void or even one that is void on its face, we must hold that the decision in question is not void. It could not be collaterally attacked. The main grounds on which it is contended that the decision is void are: (1) that the Supreme Court which rendered the decision was composed in part of two substitute members in place of two disqualified regular members, but that under the Constitution not more than one substitute could

sit; (2) That the decision was rendered upon reserved questions in equity at chambers but that the statute permitted the reservation of questions in court only, and (3) that there was no jurisdiction to construe the will after deciding that there was no longer any trust in existence. (1) It is at least doubtful whether the constitution (Const. 1894, Art. 83, sec. 1) did not permit the places of two disqualified members of the court to be filled with substitutes at the same time. The statute clearly did in terms at least. C. L., Sec. 1170. That has been the practice acquiesced in for years under the statute. The court was a *de facto* court and the decisions of a *de facto* court are not void and cannot be questioned collaterally. *Hind v. Wilder's Steamship Co.*, 14 Haw. 217. See also *Ninomiya v. Kepoi-kai*, *ante*, 273. (2) Granting that the Supreme Court did not have jurisdiction of reserved questions in equity (see *Booth v. Baker*, 10 Haw. 543, and the decision in question, in *Brown v. Brown*, 11 Haw. 47), still was the defect such as to make the decision absolutely void? The court had equity jurisdiction on appeals and it also had jurisdiction of reserved questions in law cases. The defect lies in the method of bringing the question up to this court. The questions were reserved by the Circuit Judge at chambers instead of in court. In our opinion it is not such a defect as renders the decision absolutely void. See *Hind v. Wilder's Steamship Co.*, *supra*, at page 219. (3) We may assume that according to the weight of authority equity should not entertain a bill solely for the purpose of construing a will, although a number of courts hold otherwise and this court has gone far in that direction (see *Hyde v. Smith*, 11 Haw. 535); also that if the court in the former case had jurisdiction at first primarily because a trust was involved and only incidentally of the question of construction it should have declined to answer

the latter question when it decided that there was no trust. Still, the decision would not be wholly void. It may have been erroneous without being void. Those are questions on which courts differ. The practice is as determined by the courts in each jurisdiction. If the decision was erroneous in these respects, it was mainly because there was an adequate remedy at law. But that was a matter that could be waived. See *Kaula v. Kaupahi*, *ante*, 301. And this as well as the other alleged defects above mentioned could be waived on behalf of the plaintiffs, notwithstanding they are minors, at least, so as to preclude a collateral attack by the minors. See *Kingsbury v. Buckner*, 134 U. S. 650.

"The decree appealed from is affirmed and the case remanded to the Circuit Judge.

"*A. S. Hartwell*, for plaintiffs.

"*Hatch & Silliman, J. A. Magoon and T. I. Dillon* for defendants Brown and Magoon."

VI.

Hawaiian statute of 1859 prescribing the form of a Hawaiian Supreme Court judgment and the record thereof in submitted causes; also declaring the form of "judgment" and "record" "in ordinary civil actions."

SEC. 1141. JUDGMENT IN WRITING. The justices, or a majority of them, shall thereupon hear and determine the case, and render judgment thereon, in writing, as if an action were depending.

SEC. 1142. ENTRY OF JUDGMENT; RECORD. Judgment shall be entered in such case, as in ordi-

nary civil actions. The case, the submission, and the written decision, shall constitute the record.

(Civil Code of 1859, secs. 1141-42.)

These provisions were still in force as late as 1903. (Revised Laws, Sections 1749-1750.)

Office Supreme Court, U. S.

FILED

NOV 7 1914

JAMES D. MAHER

CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 98.

THE JOHN II ESTATE, LIMITED,

Plaintiff in Error,

against

GEORGE II BROWN AND FRANCIS HYDE II BROWN, A MINOR, AND
A. A. WILDER, AS GUARDIAN *ad litem* OF FRANCIS HYDE II BROWN,

Defendants in Error.

ON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

REPLY BRIEF OF PLAINTIFF IN ERROR.

REUBEN D. SILLIMAN,
JOSEPH LAROCQUE,
CLARENCE BLAIR MITCHELL,

For Plaintiff in Error.

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IN THE
Supreme Court of the United States.

THE JOHN H ESTATE, LIMITED,
Plaintiff in Error,

AGAINST

GEORGE H BROWN and FRANCIS
HYDE H BROWN, a Minor,
and A. A. WILDER, as
Guardian *ad Litem* of Francis
Hyde H Brown,
Defendants in Error.

UPON WRIT OF ERROR TO THE UNITED STATES CIR-
CUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

**REPLY BRIEF OF PLAINTIFF IN
ERROR.**

The defendants in error have failed to meet any of the points stated in our main brief, and, with the exception of the case of *Forgyth vs. Hammond*, have ignored all our citations. They have merely re-asserted the arguments which they advanced in the second case attacking the decision of the Hawaiian Supreme Court in the first case and have characterized as "the most flagrant and obvious dicta" the determination in the second case that they could

not collaterally attack "the decision in question" *i. e.*, the judgment in the first case.

It is our purpose in the present brief to answer categorically their points, and, so far as may be necessary, to amplify the argument contained in our main brief.

I.

The Hawaiian Supreme Court's Decision in the first Brown Case was a Judgment Conclusive upon the Title and Constitutes a Bar to the Claims asserted by Defendants in Error in this Case.

Under their second point, defendants in error argue that their present claims are not barred by the decisions in the first case, and as sub-divisions under this point state the following propositions:

"1. The court, or alleged court, which rendered the opinion, was not legally constituted, and so its acts were absolutely void.

"2. These defendants in error were not parties to that cause, and no jurisdiction was ever acquired over them.

"3. The opinion was rendered upon questions reserved by the Circuit Judge, and no decree was entered in that case.

"4. If any question was legally litigated and determined within the meaning of *res*

adjudicata, it was only the question whether or not a trust existed, and that any question as to the nature of the devise to Irene and her children was only incidentally and collaterally involved."

We propose to join issue with these propositions *seriatim*.

First. The court which decided the first Brown case was legally constituted and the decision attacked was the decision of the Hawaiian Supreme Court.

a. *The court was a de jure court filled with at least de facto judges.*

The defendants in error complain that a second request was issued by Justice Whiting, the only qualified member of the court, to two members of the bar to sit with him in hearing and determining the case, but this was done at the urgent insistence of counsel for these same defendants in error, as appears by his sworn statement (Tr., 146-7), for reasons of "great urgency" which he set forth. A prompt decision meant the conversion of almost worthless pasture land into a great sugar plantation from which the defendants in error have since received one-third of the rents as dividends. (Tr., 60 and 367.)

The amendment to the statute authorizing the remaining justices "or justice" (Brief of defendants in error, p. 22) to call in judges of the trial courts or members of the bar was passed April 16, 1896, or nearly a year before the second request was issued by Justice Whiting, which was on April 9, 1897. (Tr., 148-9.) The practical interpretation

of the act prior to its amendment in 1896 had been well established. In the second case the Hawaiian Supreme Court said that "the practice (of calling in two substitute justices if necessary) had been acquiesced in for years under the statute." (Tr., 231.) The words of the constitution "any justice" were properly construed by the Hawaiian Supreme Court to extend to two as well as one disqualified justice.

b. *The point was pleaded in the second case and determined by the Hawaiian Supreme Court.*

In their bill in the second case the defendants in error allege:

"And the plaintiffs further claim and submit, that said Whiting, *J.*, as a judge of the said Supreme Court, had no constitutional right or authority to request or authorize the said Castle and Thurston to sit with him as Justices of the Supreme Court in the places of two disqualified justices thereof;

"That after the said Supreme Court, composed of said Whiting, *J.*, and of said Castle and Thurston, had heard argument of said Reserved questions of law and taken the same under consideration, a new court to rehear said argument and decide said questions, upon said Thurston declining to join in an opinion thereon, could not be and was not lawfully organized." (Tr., 167.)

This claim was squarely passed upon by the Hawaiian Supreme Court, who, having intimated that the court was properly constituted under the Hawaiian Constitution and statute, held that the decision complained of was the decision of the court. It cited its own opinion in *Hind v. Wilder's Steamship Company*, 14 Hawaiian, 217, where the

whole subject was elaborately reviewed and it was not deemed necessary to restate its reasoning. The point was put in issue in the second case by the bill and demurrer and the court disposed of it as an issue of law, thereby precluding a re-examination of the point upon collateral attack.

Second. These defendants in error were parties of record in the first Brown case and over them the court acquired and retained complete jurisdiction.

a. They were made parties by the order of Judge Cooper before process was issued.

At page 25 of their brief counsel for the defendants in error say:

"Who the parties plaintiff in any suit are is to be determined by the bill of complaint," and they call attention to the signature "A. F. Judd" upon the original bill of complaint, but do not allude to the fact that their names appear in the bill as "complainants" (Tr., 77, 78, our main brief, p. 14), nor to the additional important fact that under the same cover with the bill was filed, in accordance with Hawaiian practice, the petition of A. F. Judd for leave to exhibit the bill on behalf of "George Ii Brown and Francis Hyde Ii Brown, minors, as their next friend against Charles A. Brown for construction of the will of John Ii, deceased," nor that beneath said petition appears the customary order over the signature of Circuit Judge Cooper:

"The prayer is granted.

Henry E. Cooper, Second Judge of the Circuit Court of the First Circuit". (Tr., 96-97.)

Neither do they mention that the summons, with certificate of service upon the defendant Brown, follows said petition and order.

Naturally Chief Justice Judd, who was familiar with the Hawaiian practice, would not sign his name "A. F. Judd next friend of George Ii Brown and Francis Hyde Ii Brown" before his petition for leave to file the bill as their next friend had been granted. But when his petition was granted the defendants in error here became parties to the record and continued parties to the end of the litigation.

In *Estate of Kealicanonui*, 8 Hawaiian, 93, 100, the lower court said:

"An infant is bound by a decree in a cause where he is plaintiff, and after coming of age he is not allowed by a new bill to dispute anything that was done during his minority. The rule of law is that an infant is as much bound by a judgment in his own action as a person of full age." (8 Haw. 99.)

The Hawaiian supreme court affirmed the ruling and added:

"The rule which required 'the sanction of the Court or of one of the justices thereof, before the issuing of process', upon the application of one desirous of suing as next friend of a minor, was substantially complied with.

"The judge's order for the issue of process endorsed upon the petition was a sufficient 'sanction' or authority, for the person desirous of acting as the next friend of the minor to act throughout the proceedings in such capacity." (8 Hawaiian, 100.)

In the first Brown case an order was made expressly granting Judd authority to exhibit the bill as the next friend of the Brown children.

The objection seems trifling on collateral attack, yet it was taken seriously by the courts below, although no Hawaiian law was referred to. (See Tr., 348.) It simply illustrates the soundness of this court's observation in *Michigan Trust Co. v. Ferry*, 228 U. S. 346, 354:

"It is a strong thing for another tribunal to say that the local court did not know its own business under its own laws."

The defendants in error are silent as to what we said in our main brief in anticipation of the phase of their claim that Chief Justice Judd ought not to have appeared for both the mother and her children when there was apparently a difference in interest between them, notwithstanding there was no difference in fact. We pointed out in our main brief that the mother sought to discontinue the case and was opposed by the counsel representing Judd, who was authorized by the court to appear not only as the next friend of the children but also of the mother; that at the hearing the mother sided with Judd and the children. The court refused to allow her to discontinue the case. (See our main brief, pp. 18-20, also 15-16 and 22 to 24.) The matter was, at most, a mere irregularity and the high sounding phrase about Chief Justice Judd being a party "to as monstrous a conspiracy as was ever perpetrated" (defendant in error's brief, p. 26) is mere by-play, especially since, in the words of the Hawaiian supreme court in the second case, "no fraud, accident, mistake or surprise is relied on." (See our main brief, p. 55.)

b. *The point was pleaded in the second case and determined by the Hawaiian supreme court.*

In their bill in the second case the defendants in error allege:

"That in none of the said proceedings" (in the first case) "did the said children, although having interests thereby affected conflicting with the interests of the said Irene, their mother, have separate attorneys or counsel, but that the same attorneys and counsel appeared therein for and represented said children, and their said mother."

And thereupon they claimed and submitted "that no legal adjudication has been made of said questions of law." (Tr., 166.)

The demurrer challenged said claims (Tr., 211) and the Hawaiian supreme court necessarily determined the point in its decision that the defendants in error could not collaterally attack the decision in the first case.

Third. Under the Hawaiian Constitution and laws and the rules of the Supreme Court the decision of the court, rendered upon reserved questions, was in legal effect a judgment.

a. *The Hawaiian supreme court heard and determined the first case.*

1. The jurisdiction of the court.

The statute relating to the jurisdiction of the Supreme Court expressly empowered the court "to hear and determine all questions of law, or mixed law and fact properly brought be-

fore the court, * * * by reservation of any Circuit Court or judge." (See our main brief, pp. 92-93.) The defendants in error refer only to the statute authorizing the Circuit Court to reserve questions of law, and do not anywhere in their brief mention the broader statute conferring jurisdiction upon the Hawaiian Supreme Court, part of which we have quoted. The Hawaiian Supreme Court in the first case, although stating that it did not wish by its determination of the case to establish "a precedent for reserving questions in a cause in equity" (Tr., 157-158) had full power to hear and determine the controversy, and did hear and determine it.

2. The absence of a decree.

Counsel for defendants in error have cited no Hawaiian law whatever in support of their contention that a decree of the Hawaiian circuit judge was required in addition to the supreme court decision, but, at page 73 of their brief they say: "It is clear and in fact conceded by the plaintiff in error, that there must have been in the First Case a judgment or decree in order to bind the defendants in error. To meet this point plaintiff in error attempts to make a judgment or decree out of the opinion of the Hawaiian Supreme Court in the First Case. Such an attempt must fail. Counsel might as well attempt to say that black is white. The *fact* is there was no judgment or decree entered in the First Case. That being the fact, the legal consequences follow."

This is the only answer made by counsel for the defendants in error to the provisions of five Hawaiian constitutions (our main brief, pp. 89-92); to the rules of the Hawaiian

supreme court, bearing directly upon the subject (our main brief, pp. 26-27); to the Hawaiian statute defining an Hawaiian supreme court "judgment" and the "record" of such a judgment. (Our main brief, p. 33.) The only citation offered in support of the assertion is a quotation from the opinion of the Circuit Court of Appeals in this case which is governed by a different practice, where unsigned "opinions" are "filed" by the judges; that court failed to cite any Hawaiian law on the subject and we have shown that it was mistaken and that the Hawaiian law is controlling. (See our main brief, pp. 26 to 40.)

On page 74, the last part of the last paragraph of their brief, counsel for the defendants in error observe, repeating what they had already said at page 31, "In fact there was no order in the Supreme Court informing the equity judge who reserved the questions what the answers were. The reserved questions are still in the Supreme Court and the case itself is still before the circuit judge. Both matters are still pending."

This assertion, like the others referred to above, is not supported by any citation of Hawaiian law. As we pointed out in our main brief, pages 24 to 40, the case was finally and conclusively disposed of by the Hawaiian supreme court in accordance with the Hawaiian constitution, law and rules of court. It was for the Hawaiian supreme court itself to say if the "cause" was to be remitted to the lower court for any "further proceedings." (See our main brief, pp. 26-28.)

In *Estate of B. P. Bishop*, 5 Hawaiian 288, the court say:

"The Supreme Court has power, by statute, to make rules, and its rules, made pursuant to statute,

are law." And at page 290, after quoting the statutes authorizing the making of rules, the court quotes from *Paakuku v. Komoikchuchu*, 3 Hawaiian 642, as follows:

"A rule of court, made in pursuance of a statute has the force of law."

The statutes quoted in the Bishop case gave full power to the court to make such rules "as the court may deem necessary for the better administration of justice", as well as power to amend the rules "as often as may be found wise and necessary to *simplify said practice, and remedy any abuses or imperfections that may be found to exist therein.*" That was the essential spirit of the old Hawaiian law.

Not only was there statutory authority for the rules, but the rule in question was distinctly consistent with the Constitution which provided that the "*decisions of the supreme court*" should be "*final and conclusive upon all parties.*" (Our main brief, pp. 89 to 92.)

The next friend and counsel for the Brown children should have made timely application to the Hawaiian supreme court in the first case to have "the cause" remitted "to the lower court" for "further proceedings" if they desired anything further done in that court. In the absence of such application they were concluded by the decision rendered.

The rules quoted were adopted in 1893. A brief reference to the circumstances attending their adoption will throw further light on the point we are discussing. From 1889 until May 1st, 1893, a rule had required the attorneys of a party in whose favor a verdict or a de-

cision (by a trial court) was rendered, to file a record of the proceedings in the form annexed to the rule. It also provided that "the clerk of the court" should "state the actual date of the entry of judgment in the margin of the record, and affix the seal of the court thereto." (See 9 Hawaiian 26.)

In *Lucas v. Redward*, 9 Hawaiian, 23, decided April 19th, 1893, the Hawaiian supreme court held that a lien for materials had priority over a lower court decision rendered prior to it, where a judgment had not been entered upon the decision as required by the rule then in force. After said decision, and apparently because of it, the new rules (quoted in our main brief, pp. 93-95) were adopted "superseding all others previously made." (9 Hawaiian, 728-729.) In the new supreme court rules *every requirement as to filing a record of the proceedings in a case, as well as every requirement for entering a judgment was eliminated*. And on July 31st, 1893, after the new rules had been adopted, (9 Hawaiian, 215) the full court reaffirmed, *Rose v. Smith*, 5 Hawaiian, 380, holding that the verdict of a jury is, in Hawaii a complete estoppel. (Quoted in our main brief, pp. 29-30.) The court said:

"It is the practice in many jurisdictions for the party *desiring such entry*" (that is entry of a judgment *nunc pro tunc*) "to first obtain an order from the court. But this is not essential, and it has not been the practice in this country to obtain such order. The practice of the clerks not to enter judgments forthwith, but to take time for them, was recognized by this court in *Rose v. Smith*, 5 Haw. 380.

"Indeed, this case is direct authority for holding that a former judgment in bar must be regarded as having been entered upon the rendition of the verdict, whether actually entered or not, inasmuch as it was the clerk's duty to enter it."

Kaleialii vs. Grinbaum, 9 Hawaiian, 213, 215.

Final word on the point that the Hawaiian Supreme Court decisions were judgments.

It may be assumed that the men who established the forms of procedure for the courts of Hawaii were of limited court experience. They knew, however, that in Hawaii substance was more important than form and may have felt that anything more than the filing of a decision signed by the justices of the supreme court (see Tr., 158, 233) was mere superfluity unless that court itself ordered the cause remitted to the lower court. Those who originated the Hawaiian practice may not have known whether a further act of the clerk was customary elsewhere, or they may not have cared. Whether the result was due to deliberate intention or otherwise the consequence is the same. By the Hawaiian constitution, law and rules of court, no further act following a decision of the Hawaiian supreme court was required unless that court so ordered in its decision.

It may be assumed that the theory underlying the rule with respect to judgment rolls and the like, in some jurisdictions, is too abstruse for the Hawaiian mind. An Hawaiian, whether lawyer or layman, would be incapable of seeing why the ministerial act of a clerk in making up a record or en-

tering a judgment should be of more consequence than the signed decision of the justices or the verdict of the jury who heard and decided the merits of the controversy. To them the decision would be all important and the formality of expressing it of very little consequence. But whatever may have been the reasons, the fact is that formal technical judgments were not required in the Hawaiian supreme court when the Brown cases were decided. (See our main brief, pp. 26-40.)

b. Both points were pleaded in the second case and determined by the Hawaiian Supreme Court.

1. The jurisdiction of the court.

In their bill in the second case the defendants in error allege "that there was no statutory or other authority to reserve questions of law in said cause for the opinion thereon of the Supreme Court, and that said reserved questions of law did not fully or properly come before said Supreme Court." (Tr., 167.)

This claim also was squarely passed upon by the Hawaiian Supreme Court, who said that the defect lay in the method of bringing the question up to the court. They cited *Hind vs. Wilder's Steamship Company*, 14 Hawaiian, at page 219.

In the *Hind* case, at page 219, five Hawaiian decisions are cited where cases were brought before the Hawaiian Supreme Court by defective procedure, and it was held in each case that the decision could not be successfully assailed. The court undoubtedly felt that the reference to the *Hind* case, so recently decided by it, made it unnecessary to review the matter at greater length.

2. The absence of a decree.

Counsel for defendants in error do not refer, anywhere in their brief, to the allegation of their bill in the second case, "That no decree has been made, filed or entered in any of the aforesaid proceedings in equity", that is in the first Brown case, nor to the paragraph of their bill beginning, "Wherefore and by reason whereof, the plaintiffs" (that is these defendants in error) "claim and submit that no legal adjudication has been made of said questions of law." (See our main brief, p. 46.)

Nor do they explain why in framing the amendment to their bill in the second case they dropped the reference to "an opinion of the Supreme Court in the first case" (see our main brief, p. 45) and thereafter referred to the "proceedings and decision" in that case, which they alleged were claimed by the defendants in said case and this plaintiff in error to be "conclusive" upon them and to "forever bar them from setting up any title" under the li will to the lands in controversy. (See our main brief, pp. 49-50.)

Nor do they refer to the fifth ground of demurrer.

"5. That it appears *on the face of the said bill of complaint* that the matters set forth in the first and second paragraphs of said bill" (the allegations that they were remaindermen under the li will) "*have been heretofore adjudicated between the said parties and a judgment made and entered adversely to the contention of said plaintiffs.*" (Our main brief, p. 52.)

Neither do they deny that the Hawaiian supreme court decided in the second case, upon pleadings

framed to require a determination of the matter, that they could not collaterally attack "the decision in question." (Our main brief, p. 55.)

But they say that the Court wholly failed to consider "the very important fact" that no final decree had been entered in the first case. We have never supposed it was necessary to an adjudication that a Court should discuss each particular allegation of a bill whether pressed by counsel in argument or subordinated to other matters believed by counsel to be more important; we had supposed that all that the law required was that the matter be definitely placed upon the record, at issue in the cause and covered by the determination of the court. The point put forward was distinctly placed upon the record by the bill and challenged by the demurrer, as we have shown, and when the Hawaiian supreme court held that these defendants in error could not collaterally attack "the decision in question", surely it necessarily determined that the defendants in error were bound by the decision as by a judgment.

Fourth. The pleadings in the first case presented as a main issue the question of title and the nature of the devise to Irene.

a. The main purpose of the amended bill in the first Brown case was to obtain a determination of the character of the estate devised by the Ti will; the definition of the duties of the alleged guardians and trustees was, as set forth in the bill, subordinate to that.

In the last paragraph of both the original and amended bill in the first case it is alleged that it is

important to obtain a construction of the provisions of the will in order to determine,—

(1) *“The relative rights under said will of such minor children and the said Irene Haulou Li Brown and the said C. A. Brown;*

(2) *“And”* (their relative rights) *“to the said estate;*

(3) *“and to the income thereof;*

(4) *“and the duties of the said trustees to the several beneficiaries aforesaid under said will.”*
(Tr., 84, 122.)

It will be observed that the plaintiffs pleaded the importance of

first, a general determination of “the relative rights” of all parties,

second, a separate determination of the “estate” given,

Third, a separate determination as to the disposition of the income, and

Fourth, a determination of the duties of the trustees “to the several beneficiaries.”

The defendant Brown pleaded that an estate in fee simple was given to his wife Irene (Tr., 128). Thereupon, on said issue, the counsel for both parties joined in submitting to the Supreme Court of the country this question:

“5 Has Irene Li Brown, a fee simple title in said property or, is her estate one for life only?” (Tr., 140.)

The Hawaiian Supreme Court determined that the estate devised to Irene was an "Indefeasible Fee Simple", a "Fee Simple Absolute". (Tr., 155, 156.) That said issue of title was a material issue is apparent, we submit, from the facts stated above, from the whole record and particularly from the sworn statement of the attorney for the plaintiffs, which we have quoted in our main brief (pp. 22-23), setting forth the "great urgency" of the case and the importance of an early decision on the title. In the amendment to the bill in the second case these defendants in error allege:

"And the plaintiffs say that in consequence of said decision of said supreme court they have been deprived of trustees under said will whose duty it would be to preserve the plaintiff's rights as remaindermen in said land—" (Tr., 200. Our main brief, 50.)

But if they were not remaindermen they would not be entitled to trustees for said purpose, hence it was essential in the first case for the court to determine whether they were remaindermen.

b. The point was pleaded in the second case and determined by the Hawaiian Supreme Court.

In their bill in the second case these defendants in error alleged

"That the jurisdiction of said Supreme Court concerning the construction of said will (if it ever existed), ended upon its determining that no trust was in existence concerning said property." (Tr., 166.)

Upon the appeal they pressed this point upon the Hawaiian Supreme Court who passed upon it directly saying, at the end of their decision:

"We may assume that according to the weight of authority equity should not entertain a bill solely for the purpose of construing a will, although a number of courts hold otherwise, and this court has gone far in that direction (see *Hyde v. Smith*, 11 Haw. 535); also that if the court in the former case had jurisdiction at first primarily because a trust was involved and only incidentally of the question of construction, it should have declined to answer the latter question when it decided that there was no trust. Still, the decision would not be wholly void. It may have been erroneous without being void. Those are questions on which courts differ. The practice is as determined by the courts in each jurisdiction. If the decision was erroneous in these respects, it was mainly because there was an adequate remedy at law. But that was a matter that could be waived. See *Kaula v. Kaupahi*, ante, 301. And this as well as the other alleged defects above mentioned could be waived on behalf of the plaintiffs, notwithstanding they are minors, at least, so as to preclude a collateral attack by the minors. See *Kingsbury v. Buckner*, 134 U. S. 650." (Tr., 232.)

At page 33 of their brief the defendants in error say: "But, conceding, for the sake of argument, that the minors could have waived the point, it is clear that they did not, as they expressly raised it in the second case." We had not supposed that a waiver in a case could be withdrawn after an adverse judgment. Yet the argument seems to be seriously made. Their next friend and his counsel made the

waiver on their behalf *in the first case*, and, in the second case, the Hawaiian supreme court held they were precluded thereby, notwithstanding they were minors. (Tr., 232.) The fact that they asserted the objections in the second case, and are reasserting them here, simply shows a change of position after an adverse decision.

II.

What is a Judgment is a Question of Local Law.

In *Calaf vs. Calaf*, 232 U. S. 371, 374, decided after our main brief was filed, this Court said:

"It is urged that there was no final judgment in the former case. Upon a question of that sort we follow the local court unless stronger reasons against it are produced than can be shown here."

That was a direct review by this court of a judgment of the supreme court of Porto Rico, but in this Brown litigation a collateral attack is made upon the judgments of the supreme court of Hawaii in the two prior cases.

III.

Reply to Point VI of Defendants in Error.

a. *The title to the land was adjudicated in the second case which was brought under the quia timet jurisdiction of the court.*

The defendants in error in said second case pleaded, "that ownership in fee simple of said lands is claimed and exercised by the said corporation (this plaintiff in error) under and by virtue of said conveyances," of the defendants in the case "and also that it is claimed by the defendants that the said proceedings and decision of said Supreme Court are conclusive upon them and forever bar them from setting up any title under said will in the aforesaid lands" and prayed:

"And specifically that a declaratory decree be made declaring that the proceedings, decision and conveyances herein mentioned are invalid and of no effect as against the plaintiffs". (Tr., 199-201.)

Their counsel alleged under oath that the proposed amendment was framed "with a view of presenting the case in a form more likely to bring it under the *quia timet* jurisdiction in equity, or as a case for alternative relief". (Tr., 203-4.)

In our main brief we showed under point 5 (p. 76), that "the decree in the second case, as affirmed by the Supreme Court of Hawaii, was a judgment quieting title" and that "every possible interest" of the defendants in error "was cut off" by the decree in the second case as affirmed by the Hawaiian supreme court (citing *Northern Pacific Railway*

Co. v. Slight). The defendants in error have made no answer whatever to that argument.

The supreme court's decision with the notice of appeal was offered in evidence by the defendants in error as the "record of the proceedings" in the Hawaiian supreme court in the second case. (Tr., 73-74, 224-234.) The courts below were therefore bound to examine it in order to determine what the grounds of final decision in the second Brown case really were. It is equally before this court now. It is to be read with the decree entered in the circuit court in the second case and when so read it shows that the decree was affirmed on the ground that the defendants in error could not collaterally attack the decision in the first Brown case. The decree was not affirmed on the merely formal grounds referred to by the trial judge and of which counsel for defendants in error have sought to make much in their brief (pp. 49 to 54). They quote the opinion and cases cited by the Circuit Court of Appeals which court held that the Hawaiian supreme court's decision was "inadmissible" to show the true grounds of decision, citing *Robinson v. R. R. Co.*, 18 N. Y. Supp. 728-730. (Tr., 420.) That was a decision by an intermediate New York court holding that the opinion of the New York Court of Appeals *under the practice of that court in that state* was inadmissible *when objected to*, to show that the lower court's judgment was entered on different grounds than were shown by the lower court's record.

There is no fair analogy between the two cases. Here the Hawaiian supreme court's decision is a judgment and *the record of its action* was offered in evidence by *counsel for defendants in error* (Tr., 74), the very parties who are now objecting

to an examination of it to see what was determined by it.

In *Priest v. Las Vegas*, 232 U. S. 604, 617, this court said:

"We know of no rule which Precludes an Appellate Court deciding a Case for other Reasons than those Expressed by the Trial Court."

In *Calaca vs. Caldeira*, 13 Hawaiian, 214, 215, it is said:

"The decision of the circuit judge cannot be reversed because he gave wrong reasons, provided he came to a correct conclusion."

The reasoning of an appellate court, in jurisdictions other than Hawaii, showing the grounds of the appellate court's decision, has been held always to be competent, particularly where the appellate court has affirmed the judgment on grounds other than that of the trial court.

Hood vs. Hood, 110 Mass. 463.

Pepper vs. Donnelly, 87 Ky. 259; 8 So. Western, 441, 443.

Bigelow on Estoppel, (5th Ed.) pp. 87-88, and note, p. 87.

b. *The Hawaiian supreme court in the second case did not "attempt by its decision to cure a want of jurisdiction existing in the supreme court in the first case, to render a void judgment valid."*

It determined that the defendants in error could not collaterally attack the decision in the first case. Surely that was a matter for judicial inquiry and determination. The question was

raised by the pleadings (our main brief, pp. 50-52) at issue in the cause and finally and conclusively determined by the Hawaiian supreme court in the second case. (See *New Orleans v. Citizens Bank* and other cases cited in our main brief, pages 41-42.)

This court said in *Forsyth v. Hammond*:

"The questions both of error and of jurisdiction were certainly judicial in their nature and questions of undoubted cognizance of the (State) supreme court" (166 U. S. 517).

See also *Gila Reservoir and Irrigation Co. v. Gila Water Co.*, 205 U. S. 279, 284, cited in our main brief at page 78, which also passed directly upon the point, and which is not referred to by opposing counsel anywhere in their brief.

c. The Federal courts are bound by the decisions of the highest court of a state upon all questions relating to the organization of the State Courts, and their practice.

See

Forsyth v. Hammond, 166 U. S. 518, 519;

Norton v. Shelby County, 118 U. S. 425, 440, and

Michigan Trust Co. v. Ferry, 228 U. S. 346, 354,

cited, with quotations, our main brief, pages 74-75. No reference is made to the two latter cases by the defendant in error, nor to the part of the opinion in the first case which we quoted on page 74 of our main brief.

As to the extent to which Federal Courts will fol-

low the decisions of a state court, construing a will containing a devise of real property see

Hessinger v. Anderson, 225 U. S. 436, 445,

and other cases cited at page 41 of our main brief.

d. *There are no decisions of the Hawaiian supreme court in conflict with its determination either in the first or second Brown case.*

e. *The decision in the first Brown case that Irone took an indefensible fee simple and in the second Brown case that the defendants in error could not collaterally attack said decision were not dicta.*

See discussion, *supra*, pp. 16-18, 21-24.

f. *The decision of the supreme court in the second case did not leave open the question whether there was a judgment in the first case.*

Issue was joined on this very point, as we have indicated in our main brief, pages 46-52, 59-60, and in this brief, pages 21-24. The determination that the decision in the first case could not be collaterally attacked was necessarily based upon a determination that it was in legal effect a judgment.

In passing we call the court's attention to two Hawaiian cases bearing upon incidental matters respecting the prior judgments.

In *Halelua v. Kapa*, 5 Hawaiian, 305, 307, it is held that parties need not be opposed to each other as plaintiff and defendant to support a plea of estoppel by former judgment against one of the plaintiffs, the court saying:

"But we apprehend that no case can be found where a party joins in a pleading with other plain-

tiffs, whom she might dispute, as to a fact material between her and them, and alleges that their claim as to that fact is true, and that claim is litigated in the action and decided in their favor, and judgment thereon is entered, where such judgment was not held conclusive upon all parties."

The difference is that here the first Brown case was decided in favor of the defendant C. A. Brown who was opposing all of the plaintiffs. Had the case been decided the other way and Mrs. Holloway's estate held to be for life only, she, the defendant C. A. Brown and the plaintiff in error, as their grantee, would all have been equally bound by the decision, just as the defendants in error here are bound by it since it was in favor of the defendant C. A. Brown.

In *Kalcialii vs. Grinbaum*, 9 Hawaiian, 216, it is said:

"It is not necessary that the parties to the two suits" (in the latter of which estoppel by former judgment was pleaded) "should be nominally the same; it is sufficient if they are really and substantially the same in interest. Black, Judgments, Sec. 537. A judgment against one who sues for the benefit of another will bar a second suit by the latter in his own name."

The John Ii Estate, Limited, was in the position of a stake holder for the contending parties in the second Brown case. The parties to that case owned all its capital stock. (Tr., 168.) The defendants in the case claimed that title in fee simple had been conveyed by them to the Ii corporation. The plaintiffs claimed that it had not and that the decision that Mrs. Holloway took a title in fee was invalid as to them. There was complete identity

of interest as well as successive interest between the corporation and the parties defendant who conveyed to it. The purpose of the case was to settle the question as to whether the defendants and the corporation claiming under them were justified in relying upon the decision under which it was claimed that a title in fee simple to the lands in controversy had been conveyed to the corporation. It has been correctly assumed by all parties throughout this litigation that the plaintiff in error is entitled to rely upon the decisions in the two Brown cases to the same extent as the parties defendant.

IV.

The construction of the will.

The proper construction of the will was determined in the first Brown case. Moreover, if that case had been between other parties and the decision rendered were merely an Hawaiian precedent, the plaintiff in error would be entitled to rely upon it as controlling because it was rendered before it acquired its title to the land in controversy and before the transfer of sovereignty to the United States.

See cases cited in our main brief, pages 34 to 38.

But if there were no decision and the question were open for the independent decision of this court we submit that Mrs. Holloway, under Hawaiian law, took an estate in fee simple absolute by the *Il* will.

The will, which was in the Hawaiian language, is witnessed by three native Hawaiians and dated April 28, 1870 (Tr., 63); the testator died four days later, May 2nd, 1870 (Tr., 161); the only daughter

Irene, then but a few months old (Tr., 354), the wife, Maraea, and the brother, J. Komoikehuehu, were declared by the will to be the testator's "heirs" (Tr., 61); the daughter was referred to as the "first heir" (Tr., 61), the wife as the "second heir" and the brother as the "third heir". (Tr., 62.)

The will, according to its agreed translation, reads:

"After paying all my debts, *all my property*, both real and personal *shall descend to my heirs who are mentioned below as follows:*

"FIRST: Irene Haalon Ii, my daughter is the first heir as follows":

(Then follows description of property, including land which is the subject of this controversy; the testator also gave to his said daughter "one half of all" his "personal property".)

"SECOND: My wife Maraea Ii is my second heir."

(Then follows a description of property and a gift of the other half of the testator's personal property.)

"THIRD: My brother, J. Komoikehuehu is the third heir".

(Then follows a description of property.)

The above mentioned persons were the only ones described as the testator's "heirs".

By the fourth clause of the will, certain lands were devised to the widow of his younger brother, while by the fifth clause, the testator gave another tract of land to A. F. Judd.

The rest of the will, as set forth in the agreed translation (Tr., 62-63), is as follows:

"By this will I have appointed and I do hereby appoint J. Komoikehuehu, A. F. Judd, they both to

be the executors and guardians of the person and property of my daughter the first devisee mentioned in this will.

"All the income from the lands that are leased and all other receipts from all the lands of my daughter they two alone shall have the sole care of it until she becomes of age or has children of her own; they shall be the executors during the lifetime of my daughter and her children in accordance with my wishes as expressed in this will, and they shall receive compensation the same as provided by law.

"My executors shall place my daughter in some suitable place where she may be educated in both languages, and my child must be brought up in the path of rectitude, and the first fruits received from the lands of my daughter, that is, the money received, there shall be taken therefrom ten cents from each dollar which is set apart as an offering to God's Kingdom the same as I have done. And my executors are to carry out this request of mine.

"And further, if my daughter shall die having borne children, then the property shall descend to her children and if she should die without having had children the property shall descend to her own mother, and if she should be dead then the property shall descend to my brother J. Komoikehuchu.

"In witness of the truth of this I have hereunto signed my name with my own hand and affixed my seal this 28th day of April, A. D. 1870." (Tr., 61-63.)

The clause in the agreed translation reading "or has children of her own" was read "and in the event of her giving birth to children" by the courts below, but we fail to see that the change is of any importance upon the construction of the will. It

introduces at least as much inconsistency, not to say incongruity, as the clause did as it stood in the agreed translation, for it purports to penalize the daughter Irene for the birth of children by placing her again under guardianship if, having reached majority without children, she shall then give birth to children!

The first rule in the exposition of wills to which all rules must bend, is that the intention of the testator shall prevail, provided it be consistent with the rules of law. It is a rule of law in Hawaii that a gift of property without further words carries the fee. *Hemen v. Kamakaia*, 10 Hawaiian, 547, 552.

John Ii plainly had in view at the time he prepared this will the state of his family and the Hawaiian law only, particularly the statute of descent which reads as follows, the applicable clauses being italicised by us:

“GENERAL RULES OF DESCENT. The property shall be divided equally among the intestate's children, and the issue of any deceased child by right of representation, and if there is no child of the intestate living at his death, his estate shall descend to all his other lineal descendants; and if the said descendants are in the same degree of kindred to the intestate, they shall share the estate *per capita*, that is, equally; otherwise they shall inherit *per stirpes*, that is, by each of the children taking a share, and the grandchildren, the children of a deceased child taking a share, to be afterwards divided among themselves.

“If the intestate shall leave no issue, his estate shall descend one half to his widow and the other half to his father and mother as tenants in common; and if he leave no widow or issue, the whole

shall descend to his father and mother, or to either of them if only one be alive.

"If he shall leave no issue, nor father, nor mother, his estate shall descend one half to his widow, and the other half to his brothers and sisters, and to the children of any deceased brother or sister by right of representation.

"If the intestate be a woman, and leave no issue, her estate shall descend one-half to her husband, and the other half to her father and mother as tenants in common, and if she leave no husband nor issue, the whole shall descend to her father and mother, or to either of them if only one be alive; if she shall leave no issue, nor father, nor mother, her estate shall descend one-half to her husband and the other half to her brothers and sisters, and to the children of any brother or sister by right of representation.

"If the intestate shall leave no issue nor father, mother, brother or sister, nor descendants of any deceased brother or sister, the estate shall descend to the intestate's widow, if any; or in case the intestate be a woman, to her husband, if any.

"If the intestate shall leave none of the said relatives surviving, nor widow, nor husband, the estate shall descend in equal shares, to the next of kin in equal degree, but no person shall be entitled, by right of representation to the shares of such next of kin who shall have died; provided, however, that if the estate come through either parent of the deceased intestate the brothers and sisters of that parent and their respective heirs shall be preferred to those of the other parent." (C. C. 1859, s. 1448; am. L. 1872, c. 1, s. 1 (repealed by L. 1898, c. 47, s. 2); Cp. L. s. 1448; C. L. s. 2106; am. 1. 1898 c. 47 s. 1. Rev. Laws of Hawaii, sec. 2509.)

By this statute it will be seen that Ii's daughter, in the absence of a will, would have been his heir and that his daughter's heirs, if she had died in infancy, would have been her children, if she had left any; or, if she had died unmarried, her mother would have been her heir, if living; if her mother were dead her father's brother would have inherited this property coming to her as it did by her father's will. The last clause of the will merely declared this statutory course of descent with the thought that the property would go that way in case the daughter died during infancy. That is all, we confidently assert, that the testator had in mind in inserting said clause in his will.

The supreme court of Hawaii in the first Brown case must have taken this view and applied to the Ii will the well established Hawaiian rule that a gift of property will not be cut down to a life estate unless the intention *to give only a life estate* is clearly manifested in the will.

The Fundamental Principle of Construction in Hawaii is, and always has been, that a Construction will be Favored which will Eliminate Complication and Avoid Tying up Property.

Hemen v. Kamakaia, 10 Hawaiian, 547, 556.

The first Brown case, 11 Hawaiian, 47.

Rooke v. Queens Hospital, 12 Hawaiian, 375.

Simerson v. Simerson, 20 Hawaiian, 57 (decided in 1910).

In the Simerson case, cited above, the deed of trust, after the reservation of the income to the grantor and his wife, is so like the *Ii* will in its essential provisions that we put the two in parallel columns for comparison.

The Simerson Deed.

William Kalaehao conveyed land "absolutely unto Mary Nanea Simerson * * * and her heirs forever."

"This conveyance is under the condition mentioned below. One. That Mary Nanea Simerson cannot sell this land or mortgage it."

* * *

"And after her death the land is to descend to her child now being, William Kukailani Simerson, and other children which she may have hereafter, and to their heirs and assigns forever."

The Ii Will.

John Ii devises real and personal property "To my heirs who are mentioned below as follows: Irene Haalau Ii, my own daughter is the first heir as follows:" Then follows a description of the property devised to her.

"And further, if my daughter should die having borne children, then the property shall descend to her children, and if she should die without having had any children, the property shall descend to her own mother, and if she should be dead, then the property shall descend to my brother, J. Komoikehuhu."

It was held in the Simerson case that Mary Simerson took an estate in fee simple after the death of the grantor and his wife, just as it was held in the

first Brown case that Irene II took an estate in fee simple absolute in the property devised to her.

In the Simerson case, the court said :

"There is an inconsistency which the law cannot recognize between ownership of land in fee simple and inability of the owner to sell, mortgage, lease or devise the land at will, hence restraints upon its alienation, if attempted to be made in conveying a fee, are declared to be void. *This is not only on the ground of public policy that land titles shall be marketable but from the impossibility of granting to the same persons at the same time two entirely distinct estates, for they can neither be created nor held by him. If one holds an estate for years or for his life and also the fee the former estates merge in the fee. As for the public policy, it is impossible to say whether the grantee's child will survive her or that other children will be born and survive her, and if they do not, to say who would be the heirs. This shows the difficulty of making a title out of a life estate with remainder over if it were for the interest of the mother and child to sell or mortgage this land.*" (Our italics.)

In the first Brown case the court said :

"In the will before the court, the context demonstrates that the testator intended to vest an estate in fee simple absolute in his daughter Irene, limited only as to the time when the right to control the estate was to take effect."

It was held in both cases, that the words referring to descent to children did not reduce the first gift to a life estate. Thus we see that the decision in the first Brown case was in exact accord with the Hawaiian law as recently restated.

**John Ii Intended to Give a fee Simple
to his Daughter Irene, Limited only as
to when she might Control the Property.**

The will declared his daughter to be the testator's "first heir." Naturally she was the first object of his bounty. She was but a few months old. It probably never occurred to him that it might be argued that he had tied up his property so that his daughter could not convey any part of it even years after she should have arrived at full age and have given birth to children. When it is considered that he was an Hawaiian chief born twenty years before the first missionaries arrived, we think it fair to say that he intended no great testamentary complication. He was probably not capable of taking a very deep look into the possibilities of the future.

If it had been his intention to limit his daughter's estate to one for life only, he would have said so in plain words. That phase of the matter probably never occurred to him. If that had been his thought the natural thing would have been for him to have said that his daughter Irene was to have the property for her life only and was not to sell any part of it during her life but that it should remain intact and go to her children after her death. That would have been the plain Hawaiian way of putting such a thought. The Hawaiian mind does not express itself in abstruse, complicated and contradictory provisions. The Hawaiians have always been a simple, single minded people. It cannot be assumed that Ii understood all the subtleties of the English law. It is safe to say that the Hawaiian supreme court in construing his will knew very well that he did not understand them. They construed the will in harmony with what they believed to have been his real

intention and certainly their construction was best for all parties concerned.

It will be observed that Li gave one-half his personal property to his daughter and the other half to his wife. If the construction contended for by the defendants in error is correct, the half to Irene was but a life interest, while the half to the widow was absolute; it was only the *lands* devised to the wife that were to go to the daughter in case the wife married again. Did Li intend half of the personal property to go to his wife outright and only a life interest in the other half to his daughter? Again, any lands that might come to Irene after the death of her mother would be hers absolutely. Why should Li desire to give his daughter one class of lands for life and the other in fee simple? Again, upon the death of a child, the mother and father, under the Hawaiian statute of descent, would inherit the child's estate. Mortality among Hawaiians was just as great in 1870 as at any other time. In this very case (Tr., 368) Judge Dole ruled that one-third of the estate in remainder, which he held had been devised to the children, had vested in Mr. and Mrs. Brown, upon the death of their daughter. That Irene would have children and that some, at least, would die in infancy must have been considered by Li if he considered the complications argued here at all. Did he intend that as to such deceased children's shares Irene should have a fee simple title, while as to the rest she should have but a life interest? The Hawaiian supreme court took the common sense view that with the birth of children the property became Irene's as "an indefeasible fee simple." (Tr., 155.)

The phrase "descend to her children" was, we think, as we have already pointed out, merely the expression of Li's thought that if his daughter left

the property intact and had children they would be her heirs, and the further expression "descend to her own mother" that if she died without children, her mother would be her heir, while the last clause "shall descend to my brother" meant that if her mother was then dead and his brother living, the brother would take the property as his daughter's heir. (Section 2509 of the Revised Laws of Hawaii, quoted above.)

Since his daughter was only a few months old (Tr., 354) at the making of the will and might die shortly after him, is this construction of the will in any sense unnatural or strained?

The will also speaks of the "*receipts of the lands of my daughter*," and of "*the first fruits received from the land of my daughter*". This was simply embodying in the will Li's idea of giving tithes to the church and that guardians for his daughter should be appointed, but it never occurred to him that these clauses would be resorted to to uphold an argument that he had thereby impaired the title in his daughter and prevented the use of the land until after her death. The notion of giving a life estate to an infant daughter with remainder to the daughter's unborn children was we feel sure a more advanced idea than Li could have grasped and if it had been explained to him it is fair to say he would have repudiated it.

The Hawaiian supreme court decided that upon the birth of a child the property became vested as an indefeasible fee simple estate in the daughter Irene, that the estate to her was limited only as to the time when she should have the right to control it, and we submit that this common sense construction, under Hawaiian law, was right.

Conclusion.

It appears from the record that Judge Dole himself fully appreciated when he decided this case, that property rights, accruing under the decisions in the two prior cases, worth more than half a million dollars, would be adversely affected by his decision, for he said that "important deals in real estate have taken place in relation to the lands devised to Irene and the children in accordance with the findings of the Supreme Court in the first case" (Tr., 363), and that the deed to the plaintiff in error appeared to have been "in the nature of a compromise between Irene and C. A. Brown, in which the children, under the *status* of the Estate as it existed under the first and second decisions, may be considered to have been generously treated." (Tr., 366.) He mentioned that "transactions entered into under the rulings of the first and second cases," would "be affected by a *reversal*" and that "important dispositions of the estate have been made by those in control of it, and within their apparent powers under which rights have accrued to the Estate and their lessees," and added:

"No testimony has been offered as to the extent and character of such dispositions or of the present value of the landed property devised to Irene and her children; it is, however, agreed by counsel that the court may assume this to be over half a million dollars." (Tr., 367.)

One of the attorneys for the plaintiffs in the first case filed an affidavit in which he characterized \$6,000 per year as the "exorbitant sum" demanded for the surrender of pasturage rights in the Estate lands (Tr., 147), and we feel sure this Court will

appreciate how greatly the defendants in error have benefited by the decision in that case, for, without it, the li property would still be grazing land instead of comprising part of a large sugar plantation from which one-third of the rents are paid as dividends to the defendants in error. (Tr., 60, 146-7.)

The defendants in error are attacking the decisions in the two prior cases because they hope thereby to gain additional property. They do not offer to restore the *status quo*, nor to give up their shares in the plaintiff in error, but wish to keep such shares, and at the same time to establish rights as remaindermen in the Estate's lands to the embarrassment of the plaintiff in error, the sugar company and others. Their position, we submit, is devoid of merit, as well as contrary to law.

We ask, therefore, that the judgments below be reversed.

REUBEN D. SILLIMAN,
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CLARENCE BLAIR MITCHELL,
For Plaintiff in Error.



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NO. 427

In the Supreme Court of the United States

OCTOBER TERM, 1913.

THE JOHN H ESTATE, LIMITED,
Plaintiff in Error,
vs.

GEORGE H BROWN, and FRANCIS HYDE
H BROWN, a Minor, and A. A. WILDER, as
Guardian ad litem of Francis Hyde H Brown,
Defendants in Error.

ERROR TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to review the judgment of the Circuit Court of Appeals for the Ninth Circuit affirming the action of the District Court of the Territory of Hawaii in determining, jury waived, the title to a fund of Ten Thousand Dollars paid into the United States District Court of Hawaii by the United States for a piece of land taken under eminent domain proceedings.

As a matter of convenience, in this brief Estate means John Ii Estate, Limited, an Hawaiian corporation; Irene means Irene Haalou Ii, Irene Ii Brown or Irene Ii Holloway, as the case may be; George means George Ii Brown; Francis means Francis Hyde Ii Brown; First Case means *Irene et al. v. C. A. Brown*, 11 Haw. 47 (Tr., pp. 77-159); and Second Case means *George et al. v. C. A. Brown et al.*, 15 Haw. 308 (Tr., pp. 160-234).

In the United States District Court for Hawaii, the Estate, George and Francis, claimed the fund of Ten Thousand Dollars in whole or in part. The title to the fund, of course, depends on the title to the land from which the fund was realized.

The land in question was owned in fee simple by one John Ii, who died testate in 1870. On the construction of his will and certain proceedings in the Supreme Court of Hawaii, hereafter referred to as the First Case and the Second Case, depend the issues involved in this writ of error.

Irene married C. A. Brown in 1886 and had three children by him, namely, George, born in 1887, Francis, born in 1893, and Bernice, born in 1894. Bernice died in infancy in 1894, and under the Hawaiian statute of descent her property was inherited by her parents Irene and C. A. Brown. In 1897 all of the interests of Irene and Brown in said land was conveyed through a trustee to the Estate, although the deeds were not recorded for more than four years afterwards. In 1898 Irene was divorced

from Brown and is now the wife of C. S. Holloway. Irene has had no other children.

The first question that naturally arises is to whom was the land devised?

ARGUMENT.

I.

THE LAND WAS DEVISED TO IRENE FOR LIFE, REMAINDER IN FEE TO HER CHILDREN.

The material portions of the will of John Ii, which was in the Hawaiian language, are as follows:

“My property both real and personal shall descend to my heirs who are mentioned below as follows:

“First. Irene Haalou Ii, my own daughter, is the first heir as follows:” (describing lands, including that in question). * * * “Second. My wife Maraea Ii is my second heir” (describing lands); “and in case my wife marries again this land shall descend to my daughter, she cannot bequeath to any one. Third. My brother J. Komoikehuehu is my third heir” (describing lands); “those are the lands I bequeath to him. Fourth. My interest in the land of G. Naaiheli, my deceased younger brother, is for his widow Kamealani. Fifth. My land (describing it) is for A. F. Judd, and that is his land that I bequeath to him. * * * I do hereby appoint J. Komoikehuehu, A. F. Judd, they both to be the executors and guardians of the person and property of my daughter, the first devisee mentioned in this will. * * * They two alone shall have the sole care of it (income from lands) until she be-

comes of age, and in the event of her giving birth to children they shall be the executors during the lifetime of my daughter and her children following in accordance with my wishes as expressed in this will, and they shall receive compensation the same as provided by law. * * * And further, if my daughter should die having borne children, then the property shall descend to her children, and if she should die without having had any children the property shall descend to her own mother, and if she should be dead then the property shall descend to my brother J. Komoikehuehu." (Tr., pp. 61-63, 363.)

It is a fundamental rule in the construction of wills that, if possible, effect be given to every word and every clause in a will, and the several clauses should be made to harmonize with the general intent of the testator as it may be gathered from a consideration of the whole instrument.

Paaluki v. Keliihalcole, 11 Haw. 101, 103.

Fitchie v. Brown, 18 Haw. 52, 71.

Zupplein v. Austin, 6 Haw. 8, 10.

It is elementary that the intention of the testator is the guide which the court must follow in giving effect to the provisions found in the will.

"The first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law."

Smith v. Bell, 6 Pet. 68.

Adams v. Cowen, 177 U. S. 471, 475.

Anderson v. Messinger, 146 Fed. 929,
938.

The application of these two rules necessitates sustaining the claim of George and Francis that by this will Irene was given an estate for life in the land in question and that they, as her children, have vested remainders therein in fee simple.

At common law a devise of real estate to one without words of inheritance created only a life estate unless the context disclosed an intention on the testator's part to give a fee. In England and most of the States this rule has been changed by statute; the rule has been reversed, so that now a devise of real estate is presumed to have been intended to give a fee simple unless the context discloses an intent to give a lesser estate. Hawaii has no such statute, but its Supreme Court has decided that the word "heirs" is not necessary in a will in order to create a devise in fee simple.

Hemen v. Kamakaia, 10 Haw. 547, 551.

Here, then, we have an indefinite devise of land, that is to say, a devise to one without words of limitation, which may create a fee or a life estate, according as the context may disclose the testator's intention to have been.

King v. Hawn. Trust Co., 21 Haw. 619.

This very will illustrates this proposition.

The devises to J. Komoikehuehu, Kamealani and A. F. Judd were undoubtedly intended to

be in fee simple notwithstanding the absence of the word "heirs."

On the other hand, the devise to his wife, Maraea Ii, was just as clearly of a life estate, the intention of the testator being manifested by the clause, "in case my wife marries again this land shall descend to my daughter, she cannot bequeath to any one."

See *Haab v. Schneeberger*, 147 Mich. 583.

The devise to Irene was intended to be of a life estate, not only because no words of limitation were used, but because of the subsequent clause above quoted. Under the rule that effect should be given to every clause in the will, the provision in which it is said that "if my daughter should die having borne children then the property shall descend to her children" must not be overlooked. There is no way by which to render that clause effective except to follow the testator's manifest intention that the devise to his daughter was of a life estate with remainder in fee to her children, if any, and if not, with alternate remainders to his wife, if then alive, and, if not, to his brother.

In order to have the effect of limiting Irene's interest to a life estate it is not necessary that the clause relating to the children should have immediately followed the devise to Irene. It makes no difference in the construction of the will to ascertain the testator's intention that other clauses intervened.

Estate of Noble, 182 Pa. St. 188, 193.

Bibbens v. Potter, L. R. 10 Ch. D., 733.

Our contention as to the proper construction of this will is supported by numerous cases.

The case of *Paaluhi v. Keliihalcole*, 11 Haw. 101, is in point. In that case the testator devised land to his wife without words of inheritance and there followed a provision that after the death of the wife the property was to go to his children. It was held that the wife took a life estate and the children the remainder.

King v. King, 215 Ill. 100, 110, is directly in point. There the testator devised his farm to his daughter and then provided that in case of the death of the daughter leaving one or more children the property should go to them. The Court said:

"If an estate is devised to a person without the use of such words of inheritance, the devisee will take in fee simple, unless a less estate is limited by express words in a subsequent part of the will, or by construction, or by operation of law. The question then arises whether the fee simple estate thus devised to the plaintiff in error was reduced to an estate less than a fee by any of the clauses of the will, following and subsequent to the first clause. * * * By the use of the words, 'and in case of the death of my daughter and she leaves one or more children, then the property goes to them when of age,' it was clearly the intention of the testator that the daughter, the present plaintiff in error, should have the life estate only in the property, and that the remainder, after the expiration of the life estate, should go to the children."

That case is further in point in that there was also a provision that in case the daughter should die without issue the property should revert to the testator's heirs. The court pointed out that as the daughter had had children, no attention was to be paid to that clause.

In *Cooper v. Cooper*, 1 K. & J. 658 (69 Eng. Reprint 624), there was a bequest of personality to the testator's children with a provision that, in case of the death of either of them leaving issue, the issue of such child to take the parent's share, but in the event of their dying without leaving issue, then the share or shares of the one so dying to form a part of the residue; it was held that the children took for their respective lives only.

In *Bowers v. Bowers*, L. R. 5 Ch. App. Cas. 244, there was a devise of real and personal property to the testator's four children, and in case any of them should die leaving any child or children such child or children to take the parent's share. Lord Hatherley said (p. 247): "It appears to me impossible, without putting an extremely forced construction on the words, to say that the testator meant this property to pass absolutely to his sons upon his decease."

And so it is held in a large number of cases that where there is a limitation over after a devise that is otherwise at all doubtful, uncertain or indefinite the interest of the first taker must be held to be no more than an estate for life.

Healy v. Eastlake, 152 Ill. 424.

Fenstermaker v. Hollman, 158 Ind. 71.

Shannon v. Bonham, 27 Ind. App. 369.

Cousino v. Cousino, 86 Mich. 323.

Defreese v. Lake, 109 Mich. 415.

Hambel v. Hambel, 75 N. W. 673.

In re Keniston, 73 Vt. 75.

Adams v. Adams, 47 S. W. 335.

Wallace v. Bozarth, 223 Ill. 339.

Jones v. Jones, 66 Wis. 310.

Gilmorc v. Sellars, 59 S. E. 73.

Bibbens v. Potter, L. R. 10 Ch. D. 733.

And even an absolute gift will be cut down to a life estate by a subsequent provision when required to effectuate the intention of the testator.

Smith v. Bell, 6 Pet. 68.

Kurtz v. Weichmann, 77 N. Y. S. 964.

Hamlun v. Express Co., 107 Ill. 443.

Mansfield v. Shelton, 67 Conn. 390.

Robbins v. Smith, 72 Oh. St. 1, 17.

Grucnewald v. Neu, 215 Ill. 132.

Partee v. Thomas, 11 Fed. 769, 776.

In *Smith v. Bell*, *supra*, where the testator gave to his wife "all my personal estate whatsoever and whersoever * * * to and for her own use and disposal absolutely; the remainder after her decease to be for the use of the said Jesse Goodwin," Chief Justice Marshall said (p. 76) :

"These words give the remainder of the estate, after his wife's decease, to the son, with as much clearness as the preceding words give the whole estate to his wife. They manifest the intention of the testator to make a future provision for his son as clearly as the first part

of the bequest manifests his intention to make an immediate provision for his wife. If the first bequest is to take effect according to the obvious import of the words taken alone, the last is expunged from the will. The operation of the whole clause will be precisely the same as if the last member of the sentence were stricken out; yet both clauses are equally the words of the testator, are equally binding, and equally claim the attention of those who may construe the will. We are no more at liberty to disregard the last member of the sentence than the first. No rule is better settled than that the whole will is to be taken together, and is to be so construed as to give effect, if it be possible, to the whole. Either the last member of the sentence must be totally rejected, or it must influence the construction of the first so as to restrain the natural meaning of its words; either the bequest to the son must be stricken out, or it must limit the bequest to the wife, and confine it to her life. The limitation in remainder shows that, in the opinion of the testator, the previous words had given only an estate for life. This was the sense in which he used them.

"It is impossible to read the will without perceiving a clear intention to give the personal estate to the son after the death of his mother. 'The remainder of the said estate, after her decease, to be for the use of the said Jesse Goodwin.' Had the testator been asked whether he intended to give anything by this bequest to his son, the words of the clause would have answered the question in as plain terms as our language affords."

In 11 Haw. 47, when this will was first before the Hawaiian court, the case of *Hemen v. Kamakaia*, 10 Haw. 547, is largely relied on. In the will in that case there was an indefinite

devise with a proviso that if the donee would die without a child, then over, and the donee had a child who died in the donee's lifetime. It was held that the donee took a determinable fee which became absolute on the birth of the child, because having had a child the limitation over could never take effect. But that case is clearly distinguishable from this, because there there was no devise to the child as there was in the John II will. In following the Hemen case the provision by which an estate was provided for Irene's children was wholly ignored.

To make the point clear we repeat that clause:

"And further, if my daughter should die having borne children then the property shall descend to her children, and if she should die without having had any children the property shall descend to her own mother, and if she should be dead then the property shall descend to my brother J. Komoikchuchu."

If the words above italicized had not appeared in this will, the case would have been somewhat like that of *Hemen v. Kamakaia*. But, as already pointed out, full effect must be given to those words as well as to the other clauses. They cannot be eliminated in any such way as that attempted by the court. They constitute an absolute devise by way of remainder to the children. Even if there were no children Irene only took a life estate, as then the property would go to the mother, if alive, and if not to the brother. In any event Irene only took a life estate.

The cases referred to by the court in 11 Haw. 47 and by counsel for the Estate in the arguments below are sufficiently discussed and disposed of in the able and exhaustive opinions of the United States District Judge and of the Circuit Court of Appeals for the Ninth Circuit.

Although the case at bar was submitted in the District Court on agreed facts, including a translation of the will in question, evidence of experts was taken in regard to the meaning of one clause in the will about which the trial judge was doubtful. The translation of the whole clause as given in the agreed facts is as follows:

"They two alone shall have the sole care of it (income from lands) until she becomes of age or has children of her own; they shall be executors during the lifetime of my daughter and her children in accordance with my wishes as expressed in this will." The words "or has children of her own" are the translation of the Hawaiian words "a hanau paha kana mau keiki." The trial judge found from the evidence that these words meant "and in the event of her giving birth to children." This finding by the trial judge, who is himself an expert in regard to the Hawaiian language, is amply justified by the evidence. (Tr., pp. 258, 271, 279, 288, 295, 302, 319, 363.) With the proper translation the whole clause reads as follows: "They two alone shall have the sole care of it (income from lands) until she becomes of age, and in the event of her giving birth to children, they shall be the executors during the lifetime of my daughter and her children fol-

lowing in accordance with my wishes as expressed in this instrument."

With this translation, which was followed by the Circuit Court of Appeals, any possible inconsistency or lack of harmony between the different provisions of the will is eliminated.

The settled rule is that the concurrent findings of two courts upon a question of fact will not be disturbed by the United States Supreme Court unless clearly shown to be erroneous.

Stuart v. Hayden, 169 U. S. 1, 14.

Towson v. Moore, 173 U. S. 17, 24.

Dun v. Association, 209 U. S. 20, 23.

II.

FIRST CASE NO BAR.

Counsel for plaintiff in error contend that the Supreme Court of Hawaii has already decided that under the will Irene was given the fee, and the opinion of the Court in the First Case, reported in 11 Haw. 47, is claimed to have adjudicated the claims of these defendants in error adversely to them and that they are bound conclusively thereby. We contend that that opinion cannot be held to be *res adjudicata* for the following reasons:

1. The court, or alleged court, which rendered the opinion, was not legally constituted, and so its acts were absolutely void.

2. These defendants in error were not parties to that cause, and no jurisdiction was ever acquired over them.

3. The opinion was rendered upon questions reserved by a circuit judge, and no decree was ever entered in that cause.

4. If any question was legally litigated and determined within the meaning of *res adjudicata*, it was only the question whether or not a trust existed, and that any question as to the nature of the devise to Irene and her children was only incidentally and collaterally involved.

It is further contended by the Estate that in the Second Case, reported in 15 Haw. 308, the former decision was reaffirmed, and that the second proceeding is also *res adjudicata* and a bar to the claims set up in the case at bar.

We contend that the Second Case cannot be held to be a bar to the maintenance of the claims of these defendants in error for the reasons that the court in that case did not pretend to pass upon the construction of the John Ii will; that the title to the land in question was not adjudicated; and that in so far as the court in that case undertook to hold that the opinion of the court in the First Case was in any way effective against these defendants in error the holding was itself a nullity.

III.

THE FIRST CASE EXAMINED.

On April 7, 1894, after Irene had married and had children, "a bill to declare and execute a trust and for an accounting" was filed in equity in the circuit court of the first circuit of the Hawaiian Islands, purporting to have been brought by "Irene Haalou Ii Brown, a married woman, and George Ii Brown and Francis Hyde Ii Brown, minors, by their next

friend A. F. Judd, and A. F. Judd," against Charles A. Brown, wherein it was alleged, in substance (Tr., pp. 78-85), that John Ii died in 1870, leaving a large estate in these Islands which he devised by a will duly admitted to probate, a copy of which was attached; that A. F. Judd and J. Komoikehuehu were duly appointed executors of said will and guardians of the person and property of Irene, then aged about nine months, and duly qualified as such executors and guardians; that in 1875 said J. Komoikehuehu resigned his trust and Sanford B. Dole was duly appointed in his place; that thereafter and until November 13, 1886, said Judd and Dole performed their duties as such executors and guardians, and on said date applied to the court for their discharge as guardians on the ground that their powers had ceased to be operative because of the marriage of said Irene to C. A. Brown; that they were never discharged as executors of said will; that said Judd, upon being appointed executor and guardian as aforesaid, received from the court an instrument purporting to be a true and correct copy of the will of John Ii, upon which he exclusively relied in determining his powers and duties; that in said copy of said will the words "O laua no na hooko kauoha i ka wa e ola ana kuu kaikamahine a i kana mau keiki," meaning, "They two shall be the executors during the lifetime of my daughter and her children," were omitted; that said Judd and Dole were, therefore, not fully advised of the true intent of said will, and supposed that no trust was created by said will

that would not terminate when Irene attained her majority or married; that upon their discharge the guardians delivered over to said Irene and her husband all the property devised by the will to said Irene; that by the terms of the original will said Judd and Komoikehuehu were constituted the trustees of all the property during the life of said Irene whether married or not; that said Judd, as sole surviving trustee named in the will, submits the construction of said will to the adjudication of the court, and asks that his duties and obligations as surviving trustee be authoritatively defined; that C. A. Brown has possession of the property and claims the personal right to all the rents, issues and profits thereof, and the exclusive control and management thereof; that said C. A. Brown denies the existence of any trust, refuses to allow said Judd to take possession of the property and refuses to account to any one for the rents, issues or profits; that said Brown has wasted, squandered and mismanaged the estate, and has incurred large liabilities which he illegally seeks to make a charge upon the estate; that said Brown at the time of his marriage with Irene had full knowledge of the contents of said will; that said Brown has failed to make any settlement upon his wife, and has failed to make adequate or proper provision for her; that, unless restrained, said Brown will further waste and squander said estate and do irreparable injury thereto; that said Irene desires the court to set apart a reasonable allowance for her out of the income of the estate to

support herself and her two children; that by said will provision was made for the children of said Irene, and for the support of said Irene; that it is important to obtain a construction of such provisions and the relative rights under said will of such children and the said Irene and the said Brown in and to said estate, and to the income thereof, and to that end compainants pray that the court do construe and determine the relative rights of said children and said Irene and her husband in and to said estate under said will.

The bill prayed that the court, by appropriate decree, make provision for the support of said Irene and her children out of the income of the estate; that if there remain certain trusts to be performed the court declare and execute such trusts, and to that end that said Brown be called upon to account for all the rents, issues and profits received by him from said estate; that said Brown be declared to hold said estate in trust for the uses and purposes named in said will; that said Judd be reinstated as trustee, and said Brown be ordered to deliver over the possession, control and management of said estate to said Judd.

The bill was signed by "A. F. Judd," and in the margin were typewritten the names of "Carter & Carter" and "W. A. Kinney" as "Attorneys for plaintiffs."

Thus, the purpose of the bill was twofold—first, to have the court declare that, in accordance with the view entertained by Judd, the "executors" named in the will were trustees, and that by the terms of the will the trust was

to endure during the lifetime of Irene and her children ; and, second, to compel C. A. Brown to account, and, it may be said, incidentally, to obtain an allowance out of the estate for the support of Irene and her children.

A careful perusal of the bill discloses the lack of any intention to raise or litigate the question as to the nature of the estate devised to Irene, whether in fee or for life, as between her and her two sons. The very fact that both she and her children, if they can be said to have appeared at all, appeared as co-plaintiffs and by the same next friend, completely negatives any such idea. The real question was between Judd and Brown, as to the question of the existence of a trust.

Following the filing of the bill came an attempt on the part of Irene to discontinue the suit. This led to a protracted wrangle which culminated on August 1, 1894, in the courts declining to allow a discontinuance provided the bill be amended so "as to limit the question to the construction of the will of the late John Ii." (Tr., p. 132.) By that was meant that the charges of waste against Brown and the matter of an accounting from him should be eliminated, and that the only question should be whether or not there was a trust in existence.

Accordingly, on August 10, 1894, an amended bill was filed. (Tr., pp. 117-123.) The complainants named were "Irene Haalou Ii Brown, a married woman, and George Ii Brown and Francis Hyde Ii Brown, minors,

by their next friend A. F. Judd, and A. F. Judd and Sanford B. Dole." The bill was signed by "A. F. Judd" and "Sanford B. Dole," and in the margin were typewritten the names of "Carter & Carter" and "W. A. Kinney" as "Attorneys for Plaintiffs."

The amended bill follows, in the main, the original bill, but omits the allegations that Brown had wasted, squandered and mismanaged the estate, and incurred liabilities which he illegally sought to make a charge on the estate; that at the time of his marriage with Irene, Brown had failed to make any settlement upon his wife or to make other adequate provision for her; that unless restrained he would further waste the estate; and that Irene desired an allowance for the support of herself and her children.

The prayer that the court should construe and determine the relative rights of the children and Irene and her husband in and to the estate under the will was omitted, as were also the prayers for an allowance for support for Irene and the children, and that Brown be ordered to account for the rents, issues and profits received by him.

The only question sought to be raised by the amended bill, therefore, was that as to the existence of the alleged trust during the lifetime of Irene and her children.

To this amended bill C. A. Brown filed an answer in which he admitted most of the allegations, but denied the existence of the alleged trust; denied also that the will made any pro-

vision for the children except in the contingency of the death of Irene prior to the death of the testator; and alleged that by the true construction of the will Irene took an estate in fee simple in the land devised to her. (Tr., pp. 125-129.)

After this answer the children, if really parties, should have been given separate counsel.

No replication was filed to the answer.

On October 24, 1895, a hearing was had before Circuit Judge Cooper, and the case was taken under advisement. Judge Cooper resigned without deciding the case.

On April 16, 1896, Circuit Judge Perry, who succeeded Cooper, reserved for the consideration of the Supreme Court eight questions, which included the question whether a trust existed and also the question whether under the will Irene took the property in fee or for life only. (Tr., pp. 140-141.)

Chief Justice Judd and Justice Frear being disqualified to sit in the case, the remaining Justice requested W. R. Castle and L. A. Thurston, members of the bar, to sit with him in hearing and determining the case. (Tr., pp. 142-143.) The matter was then argued, but, Mr. Thurston being compelled to leave the Islands, Paul Neumann, another member of the bar, was substituted in his place. (Tr., p. 148.) The case was then reargued on April 9, 1897, and an opinion, written by Mr. Neumann, was rendered on May 4. (Tr., pp. 151-158.)

Some of the reserved questions were answered, but the case was not remanded to the

circuit court for further and appropriate proceedings, and no decree was ever entered in either court.

IV (A).

THE COURT AS SO CONSTITUTED WAS NOT A LEGAL COURT, AND ITS ACTS WERE THEREFORE VOID AND SUBJECT TO COLLATERAL ATTACK.

The District Court and Circuit Court of Appeals in this case in view of their conclusion did not deem it necessary to pass on this point. We contend that it is sound, however.

The constitution of the Republic of Hawaii, promulgated in 1894, provided in Section 1, Article 83, as follows:

"The Supreme Court shall consist of a Chief Justice and not less than two associate Justices. Provided, however, that in case of the disqualification or absence of any justice thereof, in any cause pending before the Court, his place for the trial and determination of said cause shall be filled as provided by law."

At the time of the promulgation of that constitution there was in force a statute providing for the filling of temporary vacancies in the Supreme Court, and it is important to note that it provided for the filling of one vacancy only.

"Parties to causes pending before the Supreme Court shall be entitled to a hearing before all of the Justices thereof, and may not be compelled to go to trial before less than the full number thereof; provided, however, that

if any Justice of the Supreme Court shall be disqualified from sitting in any cause pending before the Supreme Court, or shall be unable to attend from sickness, accident, absence, or any other reason, his place for the trial and determination of such cause shall be filled by one of the Circuit Judges who has had no connection with the said cause, either as counsel or in his official capacity, or by any competent and disinterested member of the bar of the Supreme Court thereunto authorized by the written request of the remaining Justices."

Laws 1892, ch. 57, sec. 56.

Act 12, Laws of 1896, amended the above statute by adding after the word "Justices" the words "or Justice." It should be noted, however, that this amendment had not gone into effect on April 16, 1896, when these reserved questions were certified up to the Supreme Court.

It is a consideration of great importance that at the time of the adoption of the constitution the statute provided for the filling of only one vacancy. That makes it absolutely certain, we contend, that the words "any Justice" in the constitution meant what they naturally imply, namely, one Justice.

If the word "any" could mean more than one, it could mean all just as well as two. That, of course, would be absurd.

We contend that the amendment of 1896, providing for the filling of more than one vacancy in any case, did not affect matters then pending in the Supreme Court, as it was not retroactive. But, if it was applicable, then it

was clearly contrary to the constitution, and, therefore, invalid.

Our contention is also supported by the language of Article 86 of the same constitution, which reads as follows:

"The decisions of the Supreme Court shall be final and conclusive upon all parties when made by a majority of the Justices thereof or by a majority of those who constitute the Court as provided by law in case a Justice thereof is disqualified or absent."

It, therefore, necessarily follows that the court in the case referred to was not constitutionally constituted. And, notwithstanding the court in the Second Case intimated by dictum that the court in the First Case was at least a *de facto* court and therefore beyond the reach of collateral attack, we contend that a court so constituted is no court at all.

In Wisconsin a statute provided that, in order to avoid a change of venue because of the disqualification of a judge, the parties in an action could stipulate that a member of the bar should act as judge in the cause with all the powers of a circuit judge. That statute was held unconstitutional, and in a case in which a member of the bar so acted the judgment rendered was reversed, the Supreme Court of Wisconsin holding that the member of the bar was not a *de facto* judge for the reason that in order to be a *de facto* officer the party must claim the office, which was not the case.

Van Slyke v. Ins. Co., 39 Wis. 390.

The case of *State v. Phillips*, 27 La. Ann. 663, is to the same effect, and that case was examined and approved in the later case of *State v. Sadler*, 26 So. 390, 395.

As pointed out in those cases, which are directly in point here, it is impossible that a person undertaking to act as substitute for a judge of a court be regarded as a *de facto* judge for the very reason that he has no commission, or any color of title, and does not claim the office but actually recognizes the incumbency of the real judge for whom he purports to be substituting only.

IV (B).

DEFENDANTS IN ERROR WERE NOT PARTIES TO THAT SUIT, AND NO JURISDICTION WAS EVER ACQUIRED OVER THEM THEREIN.

The original bill in the First Case, which was brought by A. F. Judd for himself and as next friend on behalf of Irene, a married woman, and George and Francis, minors, was signed "A. F. Judd" with the names of counsel typewritten; and the amended bill, in which Sanford B. Dole was joined with A. F. Judd, was signed "A. F. Judd, Sanford B. Dole," with the names of counsel typewritten as before.

A person named as a party plaintiff in a bill in equity does not become a party unless the bill is signed by him.

Chapman v. Pub. Co., 128 Mass. 478, 479.

Conceding that a bill in equity need not be signed by the complainant personally if it is signed by his counsel, here neither the original nor amended bill was signed by counsel for these defendants in error. It is not enough that the name of counsel merely appears on the bill. It is insufficient that counsel's name has been placed to the bill by another, or that it was printed or typewritten on the bill.

Davis v. Davis, 19 N. J. Eq. 180.

Ercland v. Stephenson, 45 Mich. 394, 396.

Nightingale v. Ry. Co., 18 Fed. Cas. (No. 10264) 239.

Milford & Tyler, Pl. & Pr. Eq. 66, 145-6.

The bill and the amended bill having been signed by Judd and Dole were good as their bills only.

The fact that certain motions and stipulations were signed in the own handwriting of counsel does not militate against our contention. Who the parties plaintiff in any suit are is to be determined by the bill of complaint.

The contention of plaintiff in error that, as this point was not raised in the Second Case, it has been waived is without merit, as held below. In the Second Case the point was made by the children that they and their mother, Irene, were represented by the same counsel and next friend in the First Case, a position which necessarily contested the jurisdic-

tion of the court in the First Case over their persons, and certainly inconsistent with any theory of a waiver of such point. It is inconceivable and incredible that A. F. Judd, who was then and had been for many years prior thereto Chief Justice of the Supreme Court of Hawaii, should represent at one and the same time the children and their mother, each claiming a fee simple title.

If the title to this land was involved in the First Case, then, we submit, the minors were never legally represented, and for that reason the proceedings then had were a nullity.

Either these defendants in error were parties to that First Case or they were not. If they were not, of course their rights were not affected by anything done. If they were, and the court validly passed on their rights under the will without seeing to it that they were represented by separate counsel and a next friend other than the one representing their mother, then they were the victims of as monstrous a conspiracy as was ever perpetrated.

We confidently assert that they were not parties and consequently cannot be held bound by any of the proceedings had in the case.

It is elementary that estoppel by judgment applies only to the parties to an action or their privies. A decree in a former suit is *res adjudicata* in a subsequent suit only where there is an identity of parties over whom the court acquired jurisdiction.

"A judgment rendered against one who was not made a party to the suit, or who does not appear from the record to have been proceeded

against in the action, or to have had his day in court, cannot be regarded as in any sense a valid judgment."

1 *Black Judgments*, sec. 219.

"Where the Court undertaking to try an action and render judgment never acquired jurisdiction of the person of defendant the judgment is entirely void and may be so held in a collateral proceeding."

23 Cyc. 1074.

Parker v. Spencer, 61 Tex. 155, 161.

Caranaugh v. Smith, 84 Ind. 380.

Mossman v. Gort., 10 Haw. 421, 424.

George v. Holt, 9 Haw. 47.

"Identity of parties is as essential to an estoppel by *res adjudicata* as identity of causes of action."

Fowler v. Stebbins, 136 Fed. 365, 366.

Kramer v. Matthews, 68 Ind. 172.

Hawes v. Rucker, 10 So. 85.

Lightner's Appeal, 187 Pa. St. 237.

The construction of a will is not conclusive as to persons not before the court.

Morgan v. Halsey, 97 Ky. 789, 36 L. R. A. 716.

IV (C).

THE COURT HAD NO JURISDICTION
UPON QUESTIONS RESERVED IN
EQUITY.

At the time the proceedings in the First Case were had the Hawaiian statute provided as follows:

"Whenever any question of law shall arise in any trial or other proceeding before a circuit court, the presiding judge may reserve the same for the consideration of the Supreme Court."

Laws 1892, ch. 57, sec. 72.

(Revised Laws Hawaii, sec. 1862.)

This statute has since been amended so as to provide for the reserving of questions by circuit judges at chambers.

Act 55, Laws 1907.

The very fact that the statute had to be amended so as to allow reserved questions in equity cases tends to show that previously it could not be done.

That there was previously no authority for reserving questions in equity was conceded by the Supreme Court in the very proceeding referred to.

Brown v. Brown, 11 Haw. 47.

In *Booth v. Baker*, 10 Haw. 543, 546, it was said: "We wish to observe that there is no authority, statutory or otherwise, for the reservation of questions to this court by a circuit judge sitting in equity at chambers. The proper course would be to obtain a decree from the judge and appeal."

Those decisions constitute a construction of a statute which is binding on the Federal Court in Hawaii.

The First Case did not reach the Supreme Court by appeal, writ of error or any other method authorized by statute. Consequently

it was not before that court in any legal sense or in any way that gave jurisdiction.

In *County Commissioners of Hampshire*, 140 Mass. 181, where county commissioners undertook to reserve certain questions arising in a proceeding before them to the Supreme Court, without statutory authority, the court said:

"They have no authority to reserve questions of law for the determination of this court, and cannot, by so doing, vest in the court jurisdiction to hear and determine such questions."

In *Bearce v. Bowker*, 115 Mass. 129, where the trial judge reserved a case for the Supreme Court under circumstances not authorized by statute, the Supreme Court dismissed the case, saying:

"The consent of parties cannot enable this court to take jurisdiction of a question brought before it in a manner which the law does not authorize."

See also

Terry v. Brightman, 129 Mass. 535.

Taft v. Stoddard, 141 Mass. 150.

Johnson v. Parotte, 46 Neb. 51, 56.

There being no jurisdiction, the opinion of the court in the First Case was void, the same as if it had been made by any other three members of the bar.

See

Elliott v. Peirsol, 1 Pet. (U. S.) 328, 340.
Williamson v. Berry, 8 How. (U. S.)
 495, 541.
Lewers & Cooke v. Redhouse, 14 Haw.
 290, 294.

To the suggestion that the question of jurisdiction has been waived the reply is that jurisdiction of the subject matter cannot be conferred by consent or waiver.

Dudley v. Mayhew, 3 N. Y. 9, 12.
Cooley Const. Lim. (7th Ed.) 575-6.
Holloway v. Brown, 14 Haw. 170.
In re Bishop, 11 Haw. 33.

IV (D).

NO DECREE WAS EVER ENTERED IN THE FIRST CASE, AND IT IS THEREFORE NO BAR.

As no decree was ever entered in the First Case, the decision therein answering the reserved questions does not constitute a bar to the present proceedings.

"A decree is the judgment or sentence of a court of equity. It is pronounced on the hearing of issues and determines the rights of the parties to the suit."

16 Cyc. 471.

See also 5 Enc. Pl. & Pr. 949.

The proper practice on reserved questions is, after answering the questions, to remand the case to the lower court for such proper proceedings as may be required to conform to the

law as laid down by the appellate court. And then in the lower court the appropriate decree should be entered. But here there was no decree at all ever entered in any court. In fact, there was no order in the Supreme Court informing the equity judge who reserved the questions what the answers were. The reserved questions are still in the Supreme Court, and the case itself is still before the circuit judge. Both matters are still pending.

In the absence of a decree the decision is not binding.

Oklahoma v. McMaster, 196 U. S. 529, 533.

Bouldin v. Phelps, 30 Fed. 547, 578.

Springer v. Bien, 128 N. Y. 99.

Wilson v. Hubbard, 39 Wash. 671.

Hart v. Brierly, 189 Mass. 598, 604.

Chicago v. Goodwillie, 208 Ill. 252.

Child v. Morgan, 51 Minn. 116, 121.

Therefore, even if in the First Case the court had been properly constituted and had jurisdiction of the subject matter and of the parties, these defendants in error are not bound by the opinion therein.

IV (E).

THE ONLY QUESTION OF WHICH THE ALLEGED COURT IN THE FIRST CASE COULD POSSIBLY HAVE HAD JURISDICTION WAS WHETHER A TRUST EXISTED. THE NATURE OF THE ESTATE DEVISED TO IRENE WAS, THERE-

FORE, AT MOST ONLY INCIDENTALLY AND COLLATERALLY INVOLVED. THE DETERMINATION OF COLLATERAL QUESTIONS IS NOT CONCLUSIVE EVEN BETWEEN THE SAME PARTIES.

"Courts of equity, by reason of the power they possess over trusts and trustees, have inherent jurisdiction to construe wills which create trusts, either expressly or by necessary implication. This inherent power is often confirmed by statute. But it must always appear affirmatively that the will which it is desired to have construed does in fact create a trust or the court will not entertain the bill. If the will does not involve a trust, a court of equity has no jurisdiction to construe it, as the power of equity to entertain an action for the construction of a will arises wholly out of the jurisdiction of these courts over trusts."

1 Underhill Trusts, sec. 455.

See also

3 Pom. Eq. Jur., sec. 1156.

Harrison v. Owsley, 172 Ill. 629.

Greeley v. Nashua, 62 N. H. 166.

Woodlief v. Merritt, 96 N. C. 226.

Edgar v. Edgar, 26 Ore. 65.

Mining Co. v. Hannon, 9 So. 539.

Bailey v. Briggs, 56 N. Y. 407.

Torrey v. Torrey, 55 N. J. Eq. 410.

Martin v. Martin, 44 S. E. 198, 204.

Anderson v. Anderson, 96 N. W. 276.

Toland v. Earl, 129 Cal. 148.

We contend that the jurisdiction of the court in the First Case, if it existed at all, was ex-

hausted when it held that under the will no trust existed after the marriage of Irene, and having so held the court was without jurisdiction to decide what legal estates were created by the will.

The court in the Second Case conceded that the court in the First Case should have declined to construe the will, but at most that it was an error which could have been and (inferentially) was waived by the minors. This, we think, was wrong. But, conceding, for the sake of argument, that the minors could have waived the point, it is clear that they did not, as they expressly raised it in the Second Case.

In any event, the nature of the estate devised to Irene was only incidentally or collaterally involved, and we contend that such questions, though adjudicated, are not conclusive in another proceeding even between the same parties.

McGee v. Wincholt, 23 Wash. 748.

Caranaugh v. Buchler, 120 Pa. St. 441, 457.

Lewis' Appeal, 67 Pa. St. 153, 165.

Marvin v. Dutcher, 26 Minn. 391, 402.

Wahle v. Wahle, 71 Ill. 510, 514.

Mullaney v. Mullaney, 65 N. J. Eq. 384.

V.

THE SECOND CASE EXAMINED.

On January 27, 1903, there was filed in the Circuit Court of the First Circuit of the Territory of Hawaii a bill in equity "to declare a

trust and for relief," in which George and Francis, minors, by their next friend, were plaintiffs, and C. A. Brown, J. A. Magoon and Irene were defendants.

It was alleged in substance (Tr., pp. 161-170) that John Ii died in 1870 seized and possessed in fee of certain real and personal property, leaving a last will and testament which was duly admitted to probate in and by the Supreme Court of the Kingdom, a copy whereof was attached; that in and by said will it was declared and directed by the testator that, if his daughter Irene should die having borne children, then said property should descend to her children, but that said Irene should during her lifetime have the use and benefit of said property, and that her children by virtue of said will are the absolute owners in fee of said property, subject only to their said mother's life estate; that on September 30, 1886, said Irene was married to Charles A. Brown, and that the plaintiffs of the respective ages of fifteen and ten years are the children of the said Irene and Brown; that on April 7, 1894, a bill in equity was filed in the circuit court of the first circuit of the Republic of Hawaii against the said Charles A. Brown by the said Irene and by her said children, by their next friend, A. F. Judd, and Sanford B. Dole and A. F. Judd, as executors under said will, in which said bill it was claimed by the said Judd that under said will he was made trustee of the said property during the lifetime of said Irene; also that said Charles A. Brown had taken charge of said property and refused to

allow him, the said Judd, to take possession thereof, to pay over or account for any of the income thereof, and that he had wasted, squandered and mismanaged the said property and incurred liabilities which he was illegally seeking to make a charge upon the estate; the object of said bill being to obtain a construction of said will, to establish the respective rights of said parties thereunder, that defendant be required to account for the income received by him, and that he be decreed to hold said estate for the uses and purposes named in said will, and that said Judd be reinstated as trustee thereof.

That thereafter the bill was amended so as to limit the question to the construction of said will, and certain proceedings were then had, as hereinabove set forth, which culminated in an opinion of the Supreme Court which answered certain questions reserved in said cause by Circuit Judge Perry; that in none of the said proceedings did said children, although having interests thereby affected conflicting with the interests of their mother, have separate counsel. Wherefore the plaintiffs claimed that no legal adjudication had been made of said questions of law; that no legally constituted court obtained appellate jurisdiction of any of said reserved questions; that the jurisdiction of said Supreme Court concerning the construction of said will (if it ever existed) ended upon its determining that no trust was in existence concerning said property; that there was no authority, statutory or otherwise, to reserve questions of law in said

cause, and the Supreme Court had no jurisdiction thereof; and that the court as constituted was not lawfully organized. It was further alleged that said Irene and Charles A. Brown had executed a deed of conveyance of said property to a trustee, and that said trustee had conveyed it to the Estate, a corporation, one-third of its capital stock going to Irene, one-third to C. A. Brown, and one-third to plaintiffs; that on May 27, 1898, Irene obtained a divorce from said Charles A. Brown; and it was claimed that the defendants held said shares subject to a trust that upon Irene's death said shares be assigned to plaintiffs, and that plaintiffs had reason to fear that unless restrained said Brown might sell and dispose of or pledge the shares held by him.

And the bill prayed that the defendants be ordered to assign the shares held by them to a trustee, in trust to pay the income thereof to said Irene and Charles A. Brown during the life of Irene, and at her death to assign all of the said shares to the plaintiffs absolutely, and for such further relief as the nature of the case might require.

To that bill the defendant Irene Ii Holloway filed an answer admitting most of the allegations of the bill, but alleging that she was given in and by said will a fee simple in said property. (Tr., pp. 185-186.)

The defendant Charles A. Brown demurred to the bill on several grounds, and the defendant Magoon interposed a general demurrer. (Tr., pp. 187-193.)

On February 20, 1903, Circuit Judge Gear, before whom the case had been argued, filed his decision sustaining the demurrers on the ground that a case for equitable relief had not been set out in the bill of complaint. In the decision the circuit judge said: "It must be admitted that the claim of plaintiffs as to the legal effect of the will that the children took a fee and the mother only a life estate in the property is not without force, but owing to the conclusion I have reached it is unnecessary to go into this question and in other questions argued, such as the effect of the Supreme Court decision and the legality of the court, upon grounds above set out. I think the bill fails to show equity on its face; I therefore sustain the demurrer." (Tr., p. 197.)

On February 25, 1903, a decree was entered dismissing the bill but allowing plaintiffs leave to move to amend. (Tr., pp. 198-199.)

Thereafter plaintiffs were allowed to amend their bill by adding the following allegations: That said conveyances to the trustee and to said corporation were intended and declared by the granters and grantees to convey the lands named in said will as devised to said children; that the ownership in fee simple of said lands is claimed and exercised by said corporation under said conveyances; that said shares of the capital stock of said corporation were issued on the claim by said corporation of such ownership in fee and represent the value thereof; that it is claimed by the defendants that the said proceedings and decision of said Supreme Court are conclusive upon the

plaintiffs and forever bar them from setting up any title under said will in said lands; that in consequence of said decision of said Supreme Court they have been deprived of trustees as provided in said will; and that unless the invalidity of said proceedings and decision shall be declared by the court a cloud will rest upon the plaintiffs' title, and their rights in said land as such remaindermen may be subject to costly and difficult litigation. (Tr., pp. 206-208.) †

The defendants Brown and Magoon demurred to the amended bill. Irene answered. (Tr., pp. 210-216.)

On March 11, 1903, Judge Gear filed his decision sustaining the demurrers, saying: "If the allegations of the amended bill are true, as they must be taken to be on demurrer, the demurrer must be sustained as the plaintiffs have their remedy by an action to quiet title (at law). In such an action the question is immaterial as to whether the plaintiffs are in or out of possession. So far as the bill is treated as a bill to declare a trust the allegations as to what the grantors intended and declared to convey by the deed do not help plaintiffs' case, for no intention or declaration can vary the legal effect of the deed, and if it did not have the legal effect to convey a fee simple title to the land on its face, their intention and declaration could not make it do so. For these reasons and those contained in the former decision on demurrer, this demurrer must be sustained and the bill ordered dis-

missed, and it is so ordered." (Tr., pp. 217-219.)

On the day following a decree was entered, referring to the decision and dismissing the bill with costs. (Tr., pp. 220-221.)

From this decree plaintiffs appealed to the Supreme Court, and on November 21, 1903, an opinion was rendered affirming the decree, and remanding the case to the circuit judge. (Tr., pp. 227-233.)

The Supreme Court agreed with the circuit judge, that the bill was not maintainable because Irene had at least a life estate in the property under the will, and as the deeds in question purported to convey only the lands or interests of Irene and her husband the children were not prejudiced.

They then went on to hold that the decision in the First Case was not void because the court as constituted was a *de facto* court, and that reserving questions in equity, though of doubtful propriety, was no more than an irregularity. The court also held that by the weight of authority equity will not entertain a bill in equity merely to construe a will, but that if the court in the First Case should not have answered the questions as to the nature of Irene's estate after holding that there was no trust, still the decision would not be void because if the decision was erroneous in that respect it would be mainly because there was an adequate remedy at law, a matter which the infants could waive. The court then intimated that the court in the First Case had jurisdic-

tion primarily to decide whether or not a trust existed, and incidentally of the question as to the construction of the will.

The foregoing outline of the proceedings in the Second Case shows that although these defendants in error, through their next friend, as plaintiffs therein, raised the question as to the construction of the will and endeavored to have adjudicated and established their claim as remaindermen in and to the property devised to them by their grandfather, the question was not decided. It appears that their claim in that respect was not passed on by either the circuit judge or the Supreme Court. It does appear that the Supreme Court did intimate that the points, raised again in this proceeding, as to the legality of the court in the First Case, and its jurisdiction to consider questions reserved in equity, did not render the decision in the First Case wholly void, but, as we shall proceed to show, such a consideration of those matters have not foreclosed a reconsideration of them by this court in this case.

VI.

THE SECOND CASE, IN SO FAR AS IT TREATS OR ATTEMPTS TO TREAT THE QUESTION OF TITLE TO THE LAND DEVISED BY THE WILL OF JOHN II, IS NOT BINDING AS *RES ADJUDICATA* IN THIS PRESENT ACTION FOR THE FOLLOWING REASONS:

(A) Because the title to the land was not adjudicated at all in the Second Case, and,

consequently, that case cannot bar the trying of the title in this action.

(B) Because, if the Supreme Court in the Second Case attempted by its decision to cure a want of jurisdiction existing in the Supreme Court in the First Case, to render a void judgment valid, and to preclude the possibility of any later inquiry as to the jurisdiction of the court in the First Case to adjudicate the title, that attempt was futile and of no effect, since a void judgment or opinion, rendered without jurisdiction, can never be made valid by a subsequent expression of opinion by the same or any other court. The question of jurisdiction is one which may always be raised in any subsequent litigation.

(C) Because Federal Courts are not bound by State decisions (even supposing that the question of title was a question in issue and upon which the court had jurisdiction to render a decision) on general questions of law.

(D) Because Federal Courts are not bound by State decisions, particularly when they are conflicting or when the law has not been definitely settled.

(E) Because Federal Courts are not bound (and for that matter no courts are bound) by dicta of a State Court.

(F) Because even assuming that the Supreme Court in the Second Case was in a position to pass upon the validity of the decision in the First Case, it wholly fails to even consider the very important fact that no final decree had ever been entered in the First Case at all, which fact leaves yet to be decided and adjudi-

cated upon a point which we contend can allow but one conclusion, namely, that the First Case never reached final judgment, was therefore utterly worthless as *res adjudicata*, and could be given no possible effect by any subsequent holding in another case.

(A.)

THE TITLE TO THE LAND WAS NOT ADJUDICATED AT ALL IN THE SECOND CASE AND, CONSEQUENTLY, THAT CASE CANNOT BAR THE TRYING OF THE TITLE IN THIS ACTION.

At this point we take the liberty of quoting from the very able opinion of Circuit Judge Morrow concurred in by Circuit Judges Gilbert and Ross, all of the United States Circuit Court of Appeals for the Ninth Circuit, from the holding of which Court the appellant takes its present appeal. Judge Morrow says in this regard:

“What the Supreme Court did in the Second Case was to affirm the decree of the Circuit Court. That decree had been entered upon the specific grounds set forth in the decree referring to ‘the decision in writing herein sustaining the demurrer of the defendants.’ The decision in writing to which reference was made sustained the demurrers to the bill of complaint on the ground already stated, that the bill did not state a case entitling the plaintiff to relief in equity.

“(1) Because the deed of conveyance executed by Irene and her husband referred to in

the bill of complaint did not purport to convey lands belonging to the plaintiffs; and

“(2) The bill did not show that plaintiffs were in possession of the land in controversy.

“These objections went only to the framework of the bill under certain well-known rules of procedure and not to the merits of the case. A more imperative rule requires that the merits of a case shall not be sacrificed to formal defects in practice or pleading, and hence it is that such a decision is limited to the actual questions involved.

“Where a decree refers to the ‘opinion of the trial judge in terms that make it clear that the object was to refer to it, to explain what was determined, and the reasons therefor, then such opinion becomes legitimately a part of the record, and must be looked to, to explain what was determined by the judgment or decree in question.’

“*Legrand v. Rickey's Adm'r.*, 3 S. E. (Va.) 864, 871.

It follows from the rule that the opinion of the appellate court affirming such a decree is inadmissible to show that the question determined by the trial court was different from that embraced in its decision.

“*Robinson v. N. Y. Co.*, 18 N. Y. Supp. 728, 730;

“*Penouilh v. Abraham et al.*, 9 So. (La.) 36;

“*Ohio River Railway Co. v. Fisher*, 115 Fed. 929, 935;

“*Russel v. Russel*, 134 Fed. 840, 841.

“Where a demurrer is sustained for want of equity, ‘the estoppel extends only to the pre-

cise point presented by the pleadings and decided by the ruling upon the demurrer.'

"Dennison Mfg. Co. v. Scharf Tag, Label & Box Co., 121 Fed. 313, 318;

"Wiggins Ferry Co. v. Ohio & Miss. Railway Co., 142 U. S. 396, 410.

"A decree sustaining a demurrer is no bar to subsequent proceedings upon facts and questions of law not litigated or passed upon by such decree.

"Detrick v. Sharrar, 95 Pa. St., 521, 525.

" 'If the first suit was dismissed for defect of pleadings, or parties, or a misconstruction of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit.'

"Hughes v. United States, 71 U. S. 232, 237;

"Converse v. Davies, 90 Tex. 462, 466.

"If the decision of the Supreme Court in the Second Case be thus limited to the questions considered and determined in the trial court, as it must be so limited under the authority of these cases, what were the questions left open for consideration and determination in any subsequent case? Manifestly any question involved in the merits of the case, and primarily whether the absence of a decree in the First Case in either the Circuit Court or Supreme Court of Hawaii leaves the questions involved in that case open for adjudication in this case."

(Tr., pp. 419, 420.)

What was adjudicated in the Second Case is to be determined by the decree of the circuit judge coupled with a consideration of the grounds for the decree as stated in the decision to which the decree refers. The reasoning of the Supreme Court in deciding the appeal taken from the decree is not part of the record and cannot be used to support a plea of *res adjudicata*.

As has already been pointed out, an estoppel by judgment results only from a judgment or decree which must have been duly entered of record. That decree may state on its face the grounds upon which it is based, or it may refer to a decision for those grounds. The decree sustained by the Supreme Court of Hawaii in the Second Case refers to a decision of the judge rendering the decree and that decision is to be regarded as a part of the decree. Under these circumstances in fact the decision becomes a part of the record and must be looked to to ascertain just what was the *res adjudicata* in that case.

Judge Gear's decisions show that the demurrers were sustained upon the grounds that the bill did not (either as first drawn or as amended) state a case entitling the plaintiffs to relief in equity, and that their remedy, if any, was at law, in an action to quiet title, reference being made to the cases of *Kahoiwai v. Limacu*, 10 Haw. 507, and *Ahmi v. Ashford*, 12 Haw. 12.

Chief Justice Frear, in deciding the question as to whether or not the demurrer to the

amended bill was properly sustained, considers the bill, first, as an equitable bill for the declaration of a trust and incidental relief and, secondly, as an equitable bill *quia timet*, or a bill to remove a cloud. Now, it is perfectly clear from a careful consideration, both of Chief Justice Frear's opinion, and of Judge Gear's decision, that the Supreme Court held simply and solely that the demurrers had been properly sustained on the ground that the bill did not state a case justifying relief in equity, either as a bill to declare a trust or as a bill to remove a cloud. And it is further evident that in holding that the bill did not justify the relief asked for, the holding did not necessitate the going into the question of the plaintiffs' title at all, but amounted merely to a holding that, although the plaintiffs might have perfect title, nevertheless, they had not adopted the proper means to have that title adjudicated.

Considering the bill as a bill to declare a trust, Chief Justice Frear says (15 Haw. 310) :

"It is obvious, as held by the Circuit Judge, that the amendments to the bill do not alter the result in so far as this may be considered a bill to declare a trust. The mere fact that the defendants claim Irene received the fee under the will assuming that she really had not, would not justify a decree that she did receive it or convey it or that the defendants should convey it or the stock, which might represent it if she or they had received it, to a trustee."

Considering the bill as a bill to remove a

cloud, Chief Justice Frear in the opinion of the court says (15 Haw. 311) :

“The alleged clouds are the conveyances and the decision—which it is sought to have declared invalid as against the plaintiffs. First, as to the conveyances. Assuming that the grantors had only a life estate, the conveyances would be valid to pass that and so could not properly be declared invalid as to that. And, as to the plaintiffs’ remainders, assuming that they had remainders, the court could not, on the theory of removing a cloud, declare invalid as against remaindermen conveyances that on their face purport to convey the unquestioned interest and only the interest of the life tenants. A mere declaratory decree upon the construction of the conveyances, to the effect that they did not pass the fee, is not asked for and could not properly be granted, if it were.

“Secondly, as to the decision. Of course, even if that could properly be declared of no effect as against the plaintiffs, it would still be true that no trust could be declared as to the shares of stock and yet it is somewhat doubtful if the plaintiffs can be considered as seeking a declaratory decree as to the decision alone, and, if they are, it is not clear on what theory they can rightfully ask for a decree merely declaring a decision to be of no effect as against them, without asking for an injunction or other relief to prevent its enforcement. Equity does not act directly on judgments, nor is it a branch of equity jurisdiction to merely construe judgments.”

Such was the decision of the Supreme Court of Hawaii in the Second Case. It decides merely that the bill as drawn did not justify

relief in equity, even assuming that all of its allegations were true. One of the allegations of the bill, and, of course, the primary allegation, was that the plaintiffs were entitled to remainders in fee in the land in question. The Court below said simply, "Even supposing that you are entitled to remainders in fee, supposing that your mother Irene took only a life estate under the will, yet you are not, under the bill which you have brought, entitled to relief in equity." The Supreme Court simply affirms this action by the lower court. How can it be for a moment suggested that this involves any adjudication as to the question of plaintiffs' title? For the purpose of the demurrer, plaintiffs' title is assumed to be exactly as they claim it to be. We respectfully submit that when Chief Justice Frear in the Second Case, after having decided that the demurrer had been properly sustained even if the bill were to be considered as a bill to remove a cloud, because "Equity does not act directly on judgments nor is it a branch of equity jurisdiction to merely construe judgments," went on to discuss the validity and binding character of the decision of the Supreme Court in the First Case, he was indulging in the most obvious and flagrant dicta. That dicta is, of course, entitled to no consideration either in this or in any other court.

We have already seen that the titles of defendants in error were not adjudicated in the First Case; we see now that they were not adjudicated in the Second Case. We feel sure that the Circuit Court of Appeals of the

United States for the Ninth Circuit was absolutely correct in its holding, when it held that they had never been adjudicated and that they had a right to have them adjudicated in this action.

The questions other than those necessarily involved in the sustaining of the demurrers, including the question of the construction of the will as relating to the nature of the estate devised to Irene, were, as shown particularly by Judge Gear's first decision, left open and undecided. The merits of the main controversy were not touched upon. The discussion of other matters by the Supreme Court did not enter into or form any part of the decree appealed from, and added nothing to it.

The opinion of the trial judge in sustaining the demurrers shows even more clearly than does the opinion of the Supreme Court above referred to, that the question of title was never adjudicated at all. Where a decree refers to the "opinion of the trial judge in terms that make it clear that the object was to refer to it, to explain what was determined, and the reasons therefor, then such opinion becomes legitimately a part of the record, and must be looked to, to explain what was in issue and what was determined by the judgment or decree in question." *Legrand v. Rixey's Adm.*, 3 S. E. 864, 871.

In harmony with this rule is the rule that the opinion of the appellate court affirming such decree is inadmissible to show that the

question determined was different from that embraced in the decree. *Robinson v. N. Y. Co.*, 18 N. Y. S., 728, 730.

See also

Russel v. Russel, 134 Fed. 840, 841.

Penouilh v. Abraham, 9 So. 36.

Railway v. Fisher, 115 Fed. 929, 935.

The rule of law that where a demurrer is sustained for want of equity "the estoppel extends only to the precise point presented by the pleadings and decided by the ruling upon the demurrer," is too well settled to require or justify any considerable citation of authorities here.

Dennison v. Scharf, 121 Fed. 313, 318.

Wiggins v. Railway, 142 U. S. 396, 410.

On the question of the force of a judgment as an estoppel "where a number of issues are presented, the finding on any one of which will warrant the verdict and judgment, it is competent to show that the finding was upon one rather than upon another of these different issues."

Washington Co. v. Sickles, 65 U. S. 333, 345.

Russel v. Place, 94 U. S. 606, 608.

De Sollar v. Hanscome, 158 U. S. 216, 221.

In the case of *Hughes v. United States*, 71 U. S. 232, two holdings by the Supreme Court of the State of Louisiana were held to constitute no bar to an action in the Federal Court

because, as in our case, the holdings of the Supreme Court of the State did not involve an adjudication upon the merits of the questions of title involved. The case is in some respect very like our present case.

The action was started by a bill filed in the Federal Court on behalf of the United States against Hughes and Robert Sewall and Franklin Hudson, to vacate a patent issued to Hughes April 16, 1841, for a tract of land in Louisiana, sold to John Goodbee February 22, 1822, which land was then possessed and claimed by said Sewall and Hudson under such sale to Goodbee. After various proceedings the case reached the United States Supreme Court with Hughes as appellant. There had been two prior actions in the State courts of the State of Louisiana concerning the validity of Hughes' patent, one of which, though it had failed to reach the Supreme Court, had also been favorable to Hughes. Concerning these prior actions considered as a bar to the action in the Federal Court, Mr. Justice Field, delivering the opinion of the Court, says (page 237) :

"The judgments recovered by Hughes in the State Courts of Louisiana—one in an action brought by him against Sewall and one in an action brought against him by Sewall and Hudson—constituted no bar to this suit. The first case was ejectment against Sewall, who was at the time in occupation of the land, and judgment passed in Hughes' favor, on the ground that the court could not in that form of action go behind the patent and inquire into the equities of the parties. On appeal the

judgment was affirmed by the Supreme Court of the State, but was accompanied with a stay of execution until the validity of the patent should be judicially ascertained.

“The second case was a petitory action brought by Sewall and Hudson, claimants under Goodbee, having for its object the vacation of the patent; the annulment of the above judgment against Sewall then pending on appeal in the Supreme Court of the State; the recovery of damages, and the obtaining of an injunction. No judgment was passed upon the merits of any matter alleged. The petition was dismissed for want of jurisdiction and the absence of the proper parties, so far as it related to the special relief sought by this suit—the vacation and surrender of the patent—and it was dismissed generally on the ground that it was ‘defective, uncertain, and insufficient in the statement of the cause of action.’

“It requires no argument to show that judgments like these are no bar to the present suit. IN ORDER THAT A JUDGMENT MAY CONSTITUTE A BAR TO ANOTHER, IT MUST BE RENDERED IN A PROCEEDING BETWEEN THE SAME PARTIES OR THEIR PRIVIES, AND THE POINT OF CONTROVERSY MUST BE THE SAME IN BOTH CASES, AND MUST BE DETERMINED ON ITS MERITS. IF THE FIRST SUIT WAS DISMISSED FOR DEFECT OF PLEADINGS OR PARTIES, OR A MISCONCEPTION OF THE FORM OF PROCEEDING, OR WANT OF JURISDICTION, OR WAS DISPOSED OF ON ANY GROUND WHICH DID NOT GO TO THE MERITS OF THE ACTION, THE JUDGMENT RENDERED WILL PROVE NO BAR TO AN-

OTHER SUIT. *Walden v. Bodley*, 14 Pet. 156; 1 Greenl. Ev. Secs. 529, 530, and authorities there cited."

To the effect that a decree sustaining a demurrer is no bar to subsequent proceedings upon facts and questions of law not litigated or passed upon by such decree, see *Detrick v. Sharrar*, 95 Pa. St. 521, 525.

To the effect that a decree sustaining a demurrer on the ground that the bill showed an adequate remedy at law, is no bar to new proceedings, see the same case.

In this matter the jurisdiction of the Supreme Court to hear and determine questions of law was confined to those properly brought before it by appeal (Revised Laws of Hawaii, Sec. 1628), and the only questions properly brought before it by appeal were the decree made by Judge Gear and the reasons he gave for it.

Even if the matter were in issue, if the issue was not determined because the decision turned upon some other point, or was undetermined for some other reason, there is no estoppel as to that matter.

Thompson v. Bushnell Co., 80 Fed. 332.

Kern v. Wilson, 82 Iowa 407, 412.

Hudson v. Paper Co., 80 Pac. 568.

Calaway v. Irwin, 51 S. E. 477, 480.

Mostellor v. Holbron, 14 N. W. 693.

Foster v. Busteed, 100 Mass. 409.

For further cases to the effect that a decree sustaining a demurrer to a bill in equity on

the ground that the plaintiff's remedy is at law, is not a bar to an action at law involving the same matter, see the following:

Fulton v. Hanlow, 20 Cal. 450, 484.
Cramer v. Moore, 36 Oh. St. 347.
Bigley v. Jones, 114 Pa. St. 510, 519.
Life Assn. v. Caine, 224 Ill. 599, 605.

A decree does not adjudicate any issue which the Court has excluded from its determination for any reason.

Converse v. Davis, 90 Tex. 466.
Arnold v. Arnold, 50 Ky. 81.

WE SUBMIT, THEREFORE, THAT THE ISSUE IN THIS PROCEEDING, WHICH IS THE QUESTION OF TITLE INVOLVED IN THE CLAIM OF THESE DEFENDANTS IN ERROR AS REMAINDERMEN IN THE LAND IN QUESTION UNDER THEIR GRANDFATHER'S WILL, WAS NOT ADJUDICATED IN THE SECOND CASE, AND IS NOT *RES ADJUDICATA* HERE, THAT QUESTION NOT HAVING BEEN THERE PASSED UPON AS A QUESTION IN ISSUE. WE ALSO CONTEND THAT THE ATTEMPT OF THE SUPREME COURT OF HAWAII TO PASS UPON POINTS NOT ADJUDICATED BY THE DECREE OF THE CIRCUIT JUDGE AMOUNTS TO NOTHING BUT *Dicta* AND IN NO WAY AFFECTS THE RIGHTS OF THE DEFENDANTS IN ERROR.

(B.)

IF THE SUPREME COURT IN THE SECOND CASE ATTEMPTED BY ITS DECISION TO CURE A WANT OF JURISDICTION EXISTING IN THE SUPREME COURT IN THE FIRST CASE, TO RENDER A VOID JUDGMENT VALID, AND TO PRECLUDE THE POSSIBILITY OF ANY LATER INQUIRY AS TO THE JURISDICTION OF THE COURT IN THE FIRST CASE TO ADJUDICATE THE TITLE, THAT ATTEMPT WAS FUTILE AND OF NO EFFECT, SINCE A VOID JUDGMENT OR OPINION, RENDERED WITHOUT JURISDICTION, CAN NEVER BE MADE VALID BY A SUBSEQUENT EXPRESSION OF OPINION BY THE SAME OR ANY OTHER COURT. THE QUESTION OF JURISDICTION IS ONE WHICH MAY ALWAYS BE RAISED IN ANY SUBSEQUENT LITIGATION.

If it is true, as we have contended, that the court in the First Case was without jurisdiction either of the persons of these defendants in error or of the subject matter concerning the question of title, then there can be no possible doubt that any judgment (even if there had been a judgment) in the First Case which purported to adjudicate the question of title was absolutely and irrevocably void. If the judgment was void, then it is idle to contend that the Supreme Court in the Second Case could by its decision confer jurisdiction upon

the court in the earlier case. Of course, if the judgment was void when it was rendered, it must remain void throughout all time. It is a familiar rule of law that the question as to the jurisdiction of a court in rendering any judgment is a question which may be always raised in subsequent litigation. Indeed, the Court in the Second Case fully recognized the fact that the court in the First Case had been without jurisdiction, yet in their dicta they seem to be of the opinion that it was possible for a court without jurisdiction to render a judgment which would be something other than absolutely void. This part of the court's opinion was, of course, the purest dicta, and, as is apt to be the case when a court strays beyond the field concerning which it is called upon to adjudicate, the court promulgates a most impossible legal doctrine. A court either does have, or else it does not have, power to adjudicate a certain matter. If it does not have power to adjudicate a certain matter, any adjudication attempted concerning that matter is, of course, void and worthless. Anything like a semi-void judgment, such as is hinted at by the court in the Second Case, is a phenomenon unknown to the law. Judge Morrow, delivering the opinion of the court in the Circuit Court of Appeals for the Ninth Circuit, from the holding of which court this appeal is taken, speaking of this phase of the question said in part:

"In the Second Case the Supreme Court conceded that the Supreme Court in the First

Case had no such jurisdiction, citing *Booth v. Baker*, 10 Haw. 543, 546, but held that the defect was not such as to make the decision absolutely void. This decision is clearly not binding upon the Federal Court. If the Supreme Court had no jurisdiction to answer a reserved question of fact its answer to such a question was absolutely void. *County Commissioners of Hampshire*, 140 Mass. 181, 182; *Bearce v. Bowker*, 115 Mass. 129; *Terry v. Brightman*, 129 Mass. 535. The effect of lack of jurisdiction in a court is a question open for the determination of any competent court. It is a 'Well-settled rule in jurisprudence that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings in the former are relied upon, and brought before the latter, by a party claiming the benefit of such proceedings.' *Williamson v. Berry*, 49 U. S. 495; *Guaranty Trust Co. v. Green Cove Railroad Co.*, 139 U. S. 137, 147; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 194. * * *

"The Supreme Court in the Second Case conceded that the court in the First Case, after having decided that there was no longer a trust, should have declined to construe the will. The reason for this concession is not stated. But the only possible reason that could be stated was that the court did not have jurisdiction to decide that question, but the court held that this was an error that did not make the decision void, and that it 'as well as other alleged defects above mentioned' was a matter that might be waived by the plaintiff minors so as to preclude a collateral attack by them. The answer to this proposition is the answer to the next question. The third and last question was whether the Circuit Court or the Supreme Court had jurisdiction

over the persons of the plaintiffs, notwithstanding they were not represented by separate counsel in a controversy in which their interests were in conflict with the interests of their mother Irene. We are of the opinion that neither the Circuit or Supreme Court obtained jurisdiction over the plaintiffs in the First Case, and we do not find from the record that they waived the lack of such jurisdiction.

"It therefore appears that in the Second Case the Supreme Court held that the Court in the First Case was without jurisdiction to determine the questions involved in the merits of the case. **THE OPINION OF THE COURT THAT THIS LACK OF JURISDICTION DID NOT RENDER THE DECISION OF THE COURT UPON THOSE QUESTIONS ABSOLUTELY VOID IS NOT AN OPINION BINDING UPON THE FEDERAL COURTS, AND WE DO NOT CONCUR IN THAT OPINION.**

"If a court 'act without authority, its judgments and orders are regarded as nullities; they are not voidable, but simply void; and form no bar to a remedy sought in opposition to them, even prior to a reversal; they constitute no jurisdiction; and all persons concerned in executing such judgments or sentences are considered, in law, as trespassers.' *Elliott v. Piersol*, 26 U. S. 328, 340; *Williamson v. Berry*, 49 U. S. 495, 555; *Lewers & Cooke v. Redhouse*, 14 Haw. 290, 294."

In the case of *Williamson v. Berry*, 49 U. S. 495, Mr. Justice Wayne in a very able opinion delivered on behalf of the court, said in part:

"But it is an equally well settled rule in jurisprudence, that the jurisdiction of any court exercising authority over a subject may be en-

quired into in every other court, when the proceedings in the former are relied upon, and brought before the latter, by a party claiming the benefit of such proceedings. The rule prevails, whether the decree or judgment has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery or the municipal laws of states. This court applied it as early as the year 1794, in the case of *Glass et al. v. Sloop Betsey* (3 Dallas 7). Again in 1808, in the case of *Rose v. Himely* (4 Cranch 241). Afterward, in 1828, in *Elliot v. Piersol*, a case of ejectment (1 Pet. 328, 340). This is the language of the court in that case—not stronger, though, than it was in the preceding cases: ‘It is argued that the Circuit Court of the United States had no authority to question the jurisdiction of the county court of Woodford County, and that its proceedings were conclusive upon the matter, whether erroneous or not. We agree, if the County Court had jurisdiction, its decision would be conclusive, but we cannot yield assent to the proposition that the jurisdiction of the county court could not be questioned, when its proceedings were brought collaterally before the Circuit Court. Where a court has jurisdiction, it has a right to decide every question which occurred in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court’ ” (this statement only qualifiedly represents the law today we contend). “‘But if it act without authority, its judgments and orders are nullities; they are not voidable, but simply void, etc.’ ”

“THE WANT OF JURISDICTION IS A MATTER THAT MAY ALWAYS BE SET

UP AGAINST A JUDGMENT WHEN IT IS TO BE ENFORCED, OR WHEN ANY BENEFIT IS CLAIMED UNDER IT." (*Latham v. Edgerton*, 9 Cowen 227.)

To the same effect see also *Fenton v. Garlick*, 8 Johns 194; *Kilbourne v. Woodworth*, 5 Johns 37.

Plaintiff in error does not cite a single case which even pretends to hold that a Federal Court is bound by a decision or judgment rendered by a State Court without jurisdiction to render that decision or judgment, and, of course, no such case could be cited. We contend, therefore, in this connection that a consideration of the record in this case shows that the court in the First Case was without jurisdiction to adjudicate title and that the court in the Second Case did not attempt to adjudicate title, nor did it have power to do so. We further contend that the attempt of the court in the Second Case to confer jurisdiction upon the Court in the First Case, if there was such an attempt, was empty and meaningless. We contend that the question of title, therefore, is a question which prior to the bringing of this present action had never been adjudicated by a court of competent jurisdiction, and may, therefore, be passed upon in this action. The decision in the First Case in so far as it dealt with the question of title was void—the decision in the Second Case could not and did not make it any the less void, and in so far as the decision in the Second Case attempted itself to consider the question of title, it was itself a nullity.

(C.)

FEDERAL COURTS ARE NOT BOUND BY STATE DECISIONS (EVEN SUPPOSING THAT THE QUESTION OF TITLE WAS A QUESTION IN ISSUE AND UPON WHICH THE COURT HAD JURISDICTION TO RENDER A DECISION) ON GENERAL QUESTIONS OF LAW.

An examination of the opinion of the Supreme Court of Hawaii in the Second Case will show that the only questions decided, or embodied in dicta, were questions of general law. In its dicta concerning the validity of the action of the Supreme Court in the First Case the court (1) evades any construction of the constitution of Hawaii with a view to ascertaining whether or not it permitted two attorneys to sit filling vacancies of two justices, saying merely that it was doubtful whether or not the constitution did permit two attorneys to sit; (2) the court admitted that there was no statutory authority to reserve questions in equity, and hence had no local statute to construe in that connection, and (3) the court conceded that the weight of authority was against the proposition that a bill in equity to construe a will could be entertained where there was no trust.

It is well settled that decisions of State courts on questions of general jurisprudence are not binding on Federal courts. We cite below a few of the many decisions to this effect:

- Lane v. Vick*, 3 How. 464.
Mohr v. Marrierre, 7 Biss. 419 (17 Fed. Cas. No. 9695).
Ryan v. Staples, 76 Fed. 721, 727.
Swift v. Tyson, 16 Pet. 1, 18.
Chicago v. Robbins, 2 Black 428.
R. R. v. Baugh, 149 U. S. 368.
Venice v. Murdock, 92 U. S. 501.
Hambley v. Bancroft, 83 Fed. 444, 446;
 94 Fed. 979.
Lumber Co. v. Blanks, 133 Fed. 479, 482.
Kuhn v. Fairmont Co., 215 U. S. 349,
 358.

In the case of *Lane v. Vick*, 3 How. 464, the Federal Courts were called upon to construe a will which had already been construed by the Supreme Court of Mississippi. This Court held that the Federal Courts were not bound by a decision of the State Court construing a will or other instrument. Justice McLean, delivering the opinion of the court, says:

"With the greatest respect, it may be proper to say, that *this Court do not follow the state courts in their construction of a will or any other instrument, as they do in the construction of statutes.*

"Where, as in the case of *Jackson v. Chew* (12 Wheat. 167), the construction of a will had been settled by the highest courts of the State, and had long been acquiesced in as a rule of property, this court would follow it, because it had become a rule of property. The construction of a statute by the Supreme Court of a State is followed, without reference to the interests it may affect, or the parties to

the suit in which its construction was involved. BUT THE MERE CONSTRUCTION OF A WILL BY A STATE COURT DOES NOT, AS THE CONSTRUCTION OF A STATUTE OF THE STATE, CONSTITUTE A RULE OF DECISION FOR THE COURTS OF THE UNITED STATES."

At this point we feel that it may be well to give a moment's consideration to the case of *Forsyth v. Hammond*, 166 U. S. 506, which case is so frequently cited by plaintiff in error in its brief. We have no particular quarrel with the doctrine of *Forsyth v. Hammond* as it is properly understood and has been treated in subsequent cases, but we do most strenuously deny that there is anything at all in the ruling in the case of *Forsyth v. Hammond* which could give either the First or the Second Case before the Hawaiian Supreme Court, the effect of *res adjudicata* in this action.

In the case of *Forsyth v. Hammond*, the City of Hammond, Indiana, applied to the county commissioners for an extension of its city limits. This application was denied; the city appealed to the circuit court of that county, a change of venue was had to the circuit court of another county, and that county court on a verdict of a jury entered a decree for the city for the annexation of the territory in question. The plaintiff Forsyth owned 725 acres in the annexed tract and had been a party to the proceedings before the county commissioners and the circuit court. The plaintiff took an appeal from the decision of the county court to the supreme court of the State of Indiana,

and the supreme court affirmed the holding of the county court. After the circuit court's decision the city levied taxes on the plaintiff's land and the plaintiff brought his action in the federal court for an injunction to restrain the collection of the taxes. The injunction was denied, and the plaintiff appealed to the Circuit Court of Appeals for the Seventh Circuit, which court reversed the decree of the lower court and remanded the case for further proceedings. The City of Hammond then made application to the United States Supreme Court for a writ of certiorari to review the action of the Seventh Circuit Court of Appeals. The writ was granted and the matter thus brought before this Court for review. After holding that the Supreme Court had jurisdiction to review such an action as this of the Circuit Court of Appeals, although no final decree had been entered, this Court went on to say that since the question involved centered about the construction of the State constitution and statutes, and was furthermore of a peculiarly local character, the Federal Courts should have been guided by the decision of the State Court. There is in such a holding nothing which in any way militates against that other well-established rule laid down in the case of *Lane v. Vick*, above cited, to the effect that the Federal Courts are not bound by state decisions construing wills. (For the sake of argument here, we are indulging in an assumption, contrary to the facts, namely, that the Supreme Court of the

State of Hawaii ever did, in the exercise of its proper judicial powers, decide upon the construction of the will of John II, or upon questions of title arising under that will.)

The following quotation from the case of *Forsyth v. Hammond* sufficiently shows the ground upon which the case was decided by this Court:

“The opinion of the court of appeals in this case is devoted to questions arising under the State constitution and statutes; and the amended bill filed in the Circuit Court rests the jurisdiction of that court, not upon the existence of any right claimed under the Federal constitution, but simply on adverse citizenship.

“The construction by the Courts of a State of its constitution and statutes is, as a general rule, binding on the Federal Courts. We may think that the Supreme Court of a State had misconstrued its constitution or its statutes, but we are not at liberty to therefore set aside its judgments.”

Now notice the curious way in which plaintiff in error seeks to apply the case of *Forsyth v. Hammond* in our present case. In the first place it completely overlooks the fact that every word of the decision of the Supreme Court of Hawaii in the Second Case which attempts to review the action of the Court in the First Case and to consider the jurisdiction of the Court, was the purest dicta—it refused to recognize the fact that the Supreme Court of Hawaii in the Second Case was only called upon to determine the question as to whether

or not the lower court had properly sustained the demurrer and dismissed the bill for want of jurisdiction in equity. And in the second place it overlooked the fact that above all rules giving to a State court the final right to construe the constitution and statutes of that State is the rule that the jurisdiction of any court is a question which may always be gone into in subsequent litigation in any other court. By a perverted application of the rule that the Supreme Court of a State has the final right to construe the legislation of that State, they seek to promulgate a doctrine that a Supreme Court of a State actually has the power (a power to act *ex post facto*—if we may thus use the term—and in a retroactive manner) to cure a defect in jurisdiction and to thus confer jurisdiction upon a court which had no jurisdiction at the time that it decided that case. We feel that no argument is necessary to demonstrate that any such ground or contention as this is palpably untenable.

There was recently decided by this Court a case in which the case of *Forsyth v. Hammond* was cited, and in which its total inapplicability to such a case as our present case was very nicely demonstrated. We refer to the case of *Murray v. Pocatello*, 226 U. S. 318. This case very carefully points out that even though the decision of a State Court construing a State statute will be followed by the Federal courts, nevertheless, where the action of any court has merely amounted to an affirmation of a decree sustaining a demurrer,

for want of jurisdiction, the doctrine of *Forsyth v. Hammond* can have no possible application. The following quotation from the opinion of the court, delivered by Mr. Justice Holmes, very well illustrates the holding of the Court in this regard:

"A defense more relied upon was *res adjudicata*. In 1909 the City brought a bill in equity in the Circuit Court seeking to have the Court fix reasonable rates. The defendant demurred for want of jurisdiction to give relief in equity and multifariousness. The decree was that the demurrer be sustained and the bill dismissed. The dismissal was in general terms, but with a reference to the opinion, reported in 173 Fed. 382. In the opinion, it is true, the Court expressed the view that the ordinance relied upon by the defendant was not affected by the subsequent statute, but the point decided, and the only point that could be decided, was that the demurrer should be upheld, and that the Court was without jurisdiction to 'take upon itself the exercise of the legislative or administrative power to determine in advance what will be a reasonable schedule of water rates for the defendant to charge for the next three years.' 173 Fed. 385. THE DEMURRER EXCLUDES A DECISION UPON THE MERITS, AND EVEN IF THE DECREE REFERRING TO IT DID NOT HAVE THE SAME EFFECT BY ITSELF, THE OPINION TO WHICH THE DECREE ALSO REFERS WOULD SHOW THE SAME THING. OF COURSE, IF THE COURT WAS NOT EMPOWERED TO GRANT THE RELIEF, WHATEVER THE MERITS MIGHT BE, IT COULD NOT DECIDE WHAT THE MERITS WERE. The two grounds are not on the same plane, as

they were in *Ontario Land Company v. Wilfong*, 223 U. S. 543, 559, 56 L. Ed. 544, 551, 32 Sup. Ct. Rep. 328, and when jurisdiction to grant equitable relief was denied, the ground of the merits could not be reached. *IN FORSYTH v. HAMMOND*, 166 U. S. 506, 41 L. Ed. 1095, 17 Sup. Ct. Rep. 665, *JURISDICTION HAD BEEN TAKEN IN THE EARLIER DECISION RELIED UPON. HERE IT WAS REFUSED.*"

It is true that in *Murray v. Pocatello* the decision in the prior case had been a decision in a Federal Court, but the doctrine involved is precisely the same.

The decision in *Murray v. Pocatello* was rendered by this Court December 16, 1912, and it shows the absolute soundness of the following precontentions urged by the defendants in error in this case.

First it shows THAT WHERE A DECREE IS RENDERED BY A LOWER COURT SUSTAINING A DEMURRER, AND THAT DECREE IS ACCOMPANIED BY AN OPINION OF THE COURT SHOWING THAT THE DEMURRER WAS SUSTAINED ON THE GROUND THAT THE COURT LACKED JURISDICTION, WHEN THE CASE COMES BEFORE THE APPELLATE COURT THAT COURT IS CONFINED SOLELY TO THE QUESTION OF THE JURISDICTION OF THE LOWER COURT AND IS PRECLUDED FROM ANY CONSIDERATION OF THE MERITS OF THE CLAIMS OF THE PARTIES.

Second, it shows THAT IN SUCH A CASE

REFERENCE MAY AND MUST BE HAD TO THE OPINION OF THE LOWER COURT TO ASCERTAIN WHY AND HOW THE DEMURRER WAS SUSTAINED AND THE BILL DISMISSED.

It shows that where the appellate court is thus confined to the question as to whether or not the demurrer had been properly sustained and the bill properly dismissed, WHATEVER MAY HAVE BEEN THE MERITS OF THE CASE, THE DECISION OF THAT APPELLATE COURT CANNOT POSSIBLY (EXCEPT IN DICTA) EXTEND TO THE MERITS OF THE CASE, CANNOT BAR ANY SUBSEQUENT ACTION ON THE MERITS, AND THAT THE DOCTRINE OF *FORSYTH v. HAMMOND* HAS NO APPLICATION TO SUCH A CASE.

(D.)

FEDERAL COURTS ARE NOT BOUND BY STATE DECISIONS, PARTICULARLY WHEN THEY ARE CONFLICTING OR WHEN THE LAW HAS NOT BEEN DEFINITELY SETTLED.

While as a general rule Federal Courts will accept the interpretation put by the Courts of a State upon its own constitution and statutes, yet even here, when the decision of a State Court cannot be said to definitely settle the law, it is the right and duty of the Federal Courts to exercise their own judgment.

The following quotation from *Stanley*

County v. Coler, 190 U. S. 437, 444, demonstrates this rule:

"The general rule undoubtedly is that we accept the interpretation put by the State Court upon the State constitution and statutes. There are exceptions to the rule, and the case at bar presents one of them." (Speaking of the decision in *Burgess v. Seligman*, 107 U. S. 20, the Court proceeds:) "It was said that State decisions were to be followed when they had become a rule of property, and that 'this is specially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. BUT WHERE THE LAW HAS NOT BEEN THUS SETTLED IT IS THE RIGHT AND DUTY OF THE FEDERAL COURTS TO EXERCISE THEIR OWN JUDGMENT, AS THEY ALSO ALWAYS DO IN REFERENCE TO THE DOCTRINE OF COMMERCIAL LAW AND GENERAL JURISPRUDENCE. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decision, or when there has been no decision of the State tribunal, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued.'"

The case of *Barber v. Railroad*, 166 U. S. 83, 99, further illustrates the above rule. Mr. Justice Gray, delivering the opinion of the court, says in part:

"The question whether the opinion of the Supreme Court of the state in the former action is conclusive evidence of the law of Pennsylvania in a court of the United States, depends upon the further question whether the opinion is declaratory of the settled law of Pennsylvania as to the effect of such devises or is a decision upon the construction of this particular devise.

"When the construction of certain words in deeds or wills of real estate has become a settled rule of property in a state, that construction is to be followed by the courts of the United States in determining the title to land within the state, whether between the same or between other parties. * * *

"But a single decision of the highest courts of a state upon the construction of the words of a particular devise is not conclusive evidence of the law of the state, in a case in a court of the United States, involving the construction of the same or like words, between other parties or even between the same parties or their privies, unless presented under such circumstances as to be an adjudication of their rights. *Lane v. Vick*, 44 U. S. 3; *Vick v. Vicksburg*, 1 How. (Mich.) 379; *Homer v. Brown*, 57 U. S. 354; *Brown v. Lawrence*, 3 Cush. 390; *Gibson v. Lyon*, 115 U. S. 439, 446 (29: 440, 442)."

(E.)

FEDERAL COURTS ARE NOT BOUND
(AND FOR THAT MATTER NO COURTS
ARE BOUND) BY DICTA OF A STATE
COURT.

Expressions of a State court used in construing a statute, when the case turned on

other points, do not constitute a precedent to be followed by a Federal court.

Matz v. R. R., 85 Fed. 180, 183.

While a Federal court is bound by the decisions of the highest court of a state construing a state statute, an expression of opinion by such court upon a question not involved in the ascertainment of the right or title in question between the parties, and which is, therefore, merely a dictum, is not a decision, and where the question is directly presented to a Federal court, it is bound to exercise its independent judgment thereon.

Lockhard v. Co., 123 Fed. 480, 501.

(F.)

ASSUMING THAT THE SUPREME COURT IN THE SECOND CASE WAS IN A POSITION TO PASS UPON THE VALIDITY OF THE DECISION IN THE FIRST CASE, IT WHOLLY FAILS TO EVEN CONSIDER THE VERY IMPORTANT FACT THAT NO FINAL DECREE HAD EVER BEEN ENTERED IN THE FIRST CASE AT ALL, WHICH FACT LEAVES YET TO BE DECIDED AND ADJUDICATED UPON A POINT WHICH WE CONTEND CAN ALLOW BUT ONE CONCLUSION, NAMELY, THAT THE FIRST CASE NEVER REACHED FINAL JUDGMENT, WAS THEREFORE UTTERLY WORTHLESS AS *RES ADJUDICATA*, AND COULD BE

GIVEN NO POSSIBLE EFFECT BY ANY SUBSEQUENT HOLDING IN ANOTHER CASE.

In regard to this the Circuit Court of Appeals said (Tr., p. 416) :

"The next objection to the case is we think final and conclusive, and entirely eliminates the first case from the controversy as a judgment and as the basis of a judgment in the Second Case to which we will refer presently. The objection is that after the opinion was filed in the Supreme Court answering the reserved questions no further proceedings were taken in the case. The answers to the questions were not returned to the court below and no directions given to that court as to further proceedings, and no decree has been entered in either court in the case. The case is still pending undetermined in the circuit court without force or binding effect upon the defendants in error. In the absence of a decree the decision of the court is not binding," citing *Oklahoma v. McMaster*, 96 U. S. 529, 533, and other cases.

It is clear, and in fact conceded by the plaintiff in error, that there must have been in the First Case a judgment or decree in order to bind the defendants in error.

To meet this point plaintiff in error attempts to make a judgment or decree out of the opinion of the Hawaiian Supreme Court in the First Case. Such an attempt must fail. Counsel might as well attempt to say that black is white. The *fact* is there was no judgment or decree entered in the First Case. That being the fact, the legal consequences follow.

The Circuit Court of Appeals further said (Tr., p. 419) :

"The fact that no decree was entered in the First Case was not mentioned by the Supreme Court in the Second Case, and the effect of the absence of a decree in the First Case was therefore a question, and as we view it an important question, not passed upon or in any way adjudicated in the second case."

As stated before, the proper practice in Hawaii on reserved questions is, after answering the questions, to remand the matter to the lower court for such proper proceedings as may be required to conform to the law as laid down by the appellate court. And then in the lower court the appropriate decree should be entered. But here there was no decree at all ever entered in any court. In fact, there was no order in the Supreme Court informing the equity judge who reserved the questions what the answers were. The reserved questions are still in the Supreme Court, and the case itself is still before the circuit judge. Both matters are still pending.

It is respectfully contended that the judgment below should be affirmed.

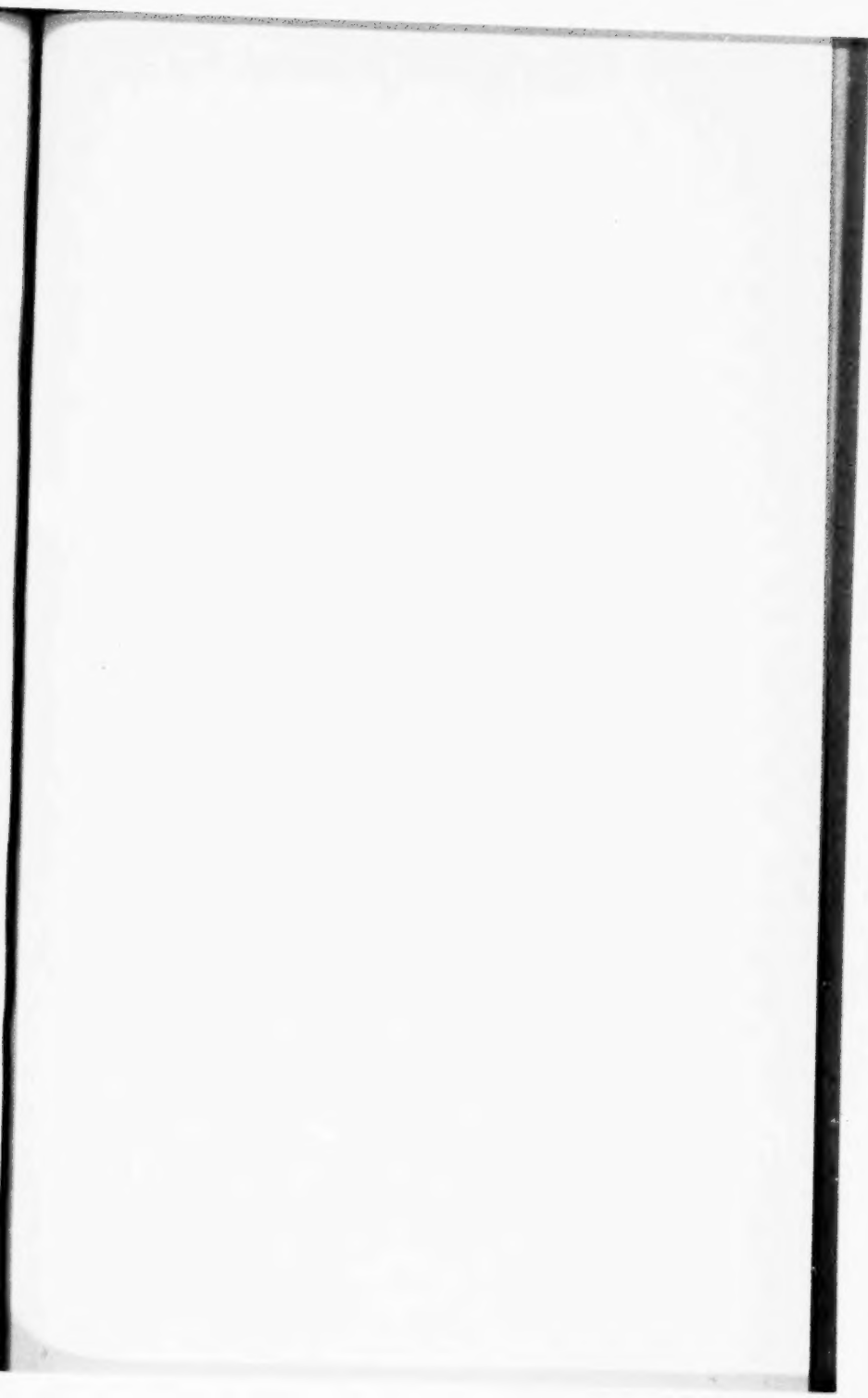
Dated at Honolulu, Hawaii, September 15, 1914.

Respectfully submitted,

A. A. WILDER.

F. E. THOMPSON.

Attorneys for Defendants in Error.



JOHN II ESTATE, LIMITED, *v.* BROWN.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT.

No. 98. Argued November 13, 1914.—Decided December 7, 1914.

The decision of the Supreme Court of the Hawaiian Islands, made while the present Territory was an independent sovereignty, in a case construing a will, that a devise of lands was in fee and not in trust, should not be disturbed or pronounced void by the courts of the Territory on grounds mainly of form and procedure.

A duly filed written decision of the highest court of the former sovereignty must be regarded as an adjudication if at that time it was the recognized practice that the case, the submission and the written decision constituted the record.

Where the constitution and statutes of the former sovereignty permitted the highest court to fill a vacancy by calling in a member of the bar, and it was the practice for years to fill more than one vacancy, the question of the validity of a judgment of that court should not be raised long after the change of sovereignty.

Even if under the statutes of the Republic of Hawaii questions in equity

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could not be reserved, if the highest court did act on questions so reserved and entertained the cause, it had authority to decide and its judgment cannot be subsequently attacked in another court on that ground.

Even if a case holding that a prior decision should not be disturbed did not again make the matter *res judicata*, the later case may be referred to as authority with regard to local procedure.

201 Fed. Rep. 224, reversed.

THE facts, which involve a will as the same had been construed by the Supreme Court of the Republic of Hawaii and the effect of that decision as an adjudication in subsequent actions in the courts of the Territory, are stated in the opinion.

Mr. Reuben D. Silliman, with whom *Mr. Joseph Larocque* and *Mr. Clarence Blair Mitchell* were on the brief, for plaintiff in error.

Mr. A. A. Wilder, with whom *Mr. F. E. Thompson* was on the brief, for defendants in error:

The land was devised to Irene for life, remainder in fee to her children.

Counsel for plaintiff in error contend that the Supreme Court of Hawaii has already decided that under the will Irene was given the fee, and the opinion of the court is claimed to have adjudicated the claims of these defendants in error adversely to them and that they are bound conclusively thereby. The opinion in the first case, 11 Hawaii, 47, cannot be held to be *res judicata*.

The alleged court, which rendered the opinion, was not legally constituted, and so its acts were absolutely void.

These defendants in error were not parties to that cause, and no jurisdiction was ever acquired over them.

The opinion was rendered upon questions reserved by a circuit judge, and no decree was ever entered in that cause.

If any question was legally litigated and determined within the meaning of *res judicata*, it was only the question whether or not a trust existed, and that any question as to the nature of the devise to Irene and her children was only incidentally and collaterally involved.

The court delivering the first opinion as it was constituted was not a legal court, and its acts were therefore void and subject to collateral attack. See § 1, Art. 83, Constitution of the Republic of Hawaii, promulgated in 1894; Laws 1892, c. 57, § 56, as amended by Act 12, Laws of 1896; *Van Slyke v. Ins. Co.*, 39 Wisconsin, 390; *State v. Phillips*, 27 La. Ann. 663; *State v. Sadler*, 26 So. Rep. 390, 395.

A person undertaking to act as substitute for a judge of a court cannot be regarded as a *de facto* judge for the very reason that he has no commission, or any color of title, and does not claim the office but actually recognizes the incumbency of the real judge for whom he purports to be substituting only.

The court had no jurisdiction upon questions reserved in equity. Laws 1892, c. 57, § 72; Revised Laws Hawaii, § 1862. See also Act 55, Laws 1907; *Brown v. Brown*, 11 Hawaii, 47; *County Commissioners of Hampshire*, 140 Massachusetts, 181; *Bearce v. Bowker*, 115 Massachusetts, 129; *Terry v. Brightman*, 129 Massachusetts, 535; *Taft v. Stoddard*, 141 Massachusetts, 150; *Johnson v. Parotte*, 46 Nebraska, 51, 56.

There being no jurisdiction, the opinion of the court in the first case was void, the same as if it had been made by any other three members of the bar. See *Elliott v. Peirsol*, 1 Pet. 328, 340; *Williamson v. Berry*, 8 How. 495, 541; *Lewers & Cooke v. Redhouse*, 14 Hawaii, 290, 294.

Jurisdiction of the subject-matter cannot be conferred by consent or waiver. *Dudley v. Mayhew*, 3 N. Y. 9, 12; *Cooley*, Const. Lim. (7th Ed.) 575-6; *Holloway v. Brown*, 14 Hawaii, 170; *In re Bishop*, 11 Hawaii, 33.

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No decree was ever entered in the first case, and it is therefore no bar. 16 Cyc. 471; 5 Enc. Pl. & Pr. 949; *Oklahoma v. McMaster*, 196 U. S. 529, 533; *Bouldin v. Phelps*, 30 Fed. Rep. 547, 578; *Springer v. Bien*, 128 N. Y. 99; *Wilson v. Hubbard*, 39 Washington, 671; *Hart v. Brierly*, 189 Massachusetts, 598, 604; *Chicago v. Goodwillie*, 208 Illinois, 252; *Child v. Morgan*, 51 Minnesota, 116, 121.

Federal courts are not bound by state decisions, on general questions of law.

Federal courts are not bound by state decisions, particularly when they are conflicting or when the law has not been definitely settled.

Federal courts are not bound by *dicta* of a state court.

Even assuming that the Supreme Court in the second case was in a position to pass upon the validity of the decision in the first case, it wholly fails to even consider the fact that no final decree had ever been entered in the first case at all, which fact leaves yet to be decided and adjudicated upon a point which we contend can allow but one conclusion, namely, that the first case never reached final judgment, was therefore utterly worthless as *res judicata*, and could be given no possible effect by any subsequent holding in another case.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case began as a proceeding by the United States for the taking of certain land. The land was condemned and the sum that was determined by the judgment to be the compensation due to the owners was paid into court. Supplementary proceedings then were had in the cause, according to local statutes, for the determination of the title to this fund as among different claimants who appeared and set up their claims. The plaintiff in error

claimed the whole by virtue of a deed from Irene Ii (Brown), daughter of John Ii, to its grantor, alleging that John Ii devised the land to Irene in fee and that her title in fee was established by judgments of the Supreme Courts of the Hawaiian Islands and of the Territory of Hawaii. The defendants in error, two of the three children of Irene, claim one-third each, subject to their mother's life-interest, on the ground that John Ii devised the land to Irene for life only with remainder to her children. The Circuit Court of Appeals sustained the latter claim. 119 C. C. A. 458; 201 Fed. Rep. 224.

It will be enough to give a few passages from the agreed but more or less impugned translation of the will out of its original Hawaiian: "All my property both real and personal shall descend to my heirs who are mentioned below as follows: First. Irene Haalou Ii, my own daughter is the first heir as follows: [describing certain lands, including that condemned] . . . I do hereby appoint J. Komoikehuehu, A. F. Judd, they both to be the executors and guardians of the person and property of my daughter the first devisee mentioned in this will. All the income from the lands that are leased and all other receipts from all the lands of my daughter they two alone shall have the sole care of it until she becomes of age or has children of her own; they shall be the executors during the lifetime of my daughter and her children in accordance with my wishes as expressed in this will. . . . And further, if my daughter should die having borne children, then the property shall descend to her children and if she should die without having had any children the property shall descend to her own mother, and if she should be dead then the property shall descend to my brother J. Komoikehuehu." It is obvious what hesitation an American court ought to feel in attempting to construe a Hawaiian will on the strength of this translation, and, still more, in disregarding the opinion of the court on the spot, familiar

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with Hawaiian habits and not improbably with Hawaiian speech.

John Li died in 1870. In 1894, the Hawaiian Islands then being an independent sovereignty, a bill was filed by Irene and her two children, the present defendants in error, by A. F. Judd as their next friend, and A. F. Judd, as executor, guardian of Irene, and trustee under the will, against Charles A. Brown, husband of Irene, alleging that Brown was in possession and squandering the estate, and praying among other things for a construction of the will and determination of the relative rights of the children and mother and for the reinstatement of Judd in possession as trustee. An amended complaint joined Sanford B. Dole as plaintiff, he having been appointed to take the place of Komoikehuehu deceased. The case dragged along and finally, the Chief Justice and one of the Justices being disqualified, the remaining Justice requested and authorized two members of the bar to sit with him, which they did. At the hearing they reserved questions of law to the Supreme Court of the Islands, two of which were: "1. Was a trust created in the property devised to Irene Li by the will of her father John Li? 5. Has Irene Li Brown, a fee simple title in said property or, is her estate one for life only?" The Supreme Court entertained the case and, as appears from the opinion, against the earnest contention of the counsel for the plaintiffs decided on May 11, 1897, that Irene, after she bore a child, became the owner in fee simple of the estate. This decision is relied upon as an adjudication concluding the present case. *Brown v. Brown*, 11 Hawaii, 47.

The chief objection that is urged to the conclusiveness of the decision is that after the opinion of the Supreme Court no further proceedings were taken in the case. This seems to be answered by the decision next mentioned, and by the analogy, if not by the letter of the statute then in force as to cases stated; that the case, the submission, and

the written decision, shall constitute the record. Civil Code of 1859, § 1142. It is said further that the Court was not legally constituted because two members of the bar were called in. The Constitution and statutes allowed the filling of a vacancy if a Justice was disqualified but it is said that the power extended only to a single one. We understand that the practice was the other way for years, and as the Supreme Court seems to have felt no difficulty it would be most undesirable to allow the question to be raised now. It is urged again that the children were not properly parties and were not separately represented although their interest was adverse to their mother's. The bill was brought by the trustee for instructions among other things and the *cestuis que trust* were made parties. It is true that they do not appear to have had separate counsel, but it appears from the decision of the court that the counsel represented and pressed their interest against that of their mother, and it seems to us not permissible to declare that the highest court of what was then a foreign jurisdiction did not know its own powers and was proceeding in a manner that the court of another country might pronounce wholly void. Finally it is said that under the statutes in force questions in equity could not be reserved by circuit judges sitting in chambers. To this again it is enough to answer that the court had authority to decide that matter and, although disapproving the practice, entertained the cause and thereby established its warrant in law.

In January, 1903, another bill was brought by the defendants in error, by their next friend, A. F. Judd, the purposes of which it is unnecessary to state further than it sought to have the previous decision declared void and the interest of Irene adjudged to be only a life estate. The bill was dismissed upon demurrer and the Supreme Court of the Territory expressed the opinion that the previous decision precluded a collateral attack by the

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minors, dealing in terms with all the objections except the first which it sufficiently disposed of by assuming the prior decision to have the effect of a formal decree. *Brown v. Brown*, 15 Hawaii, 308. See *Calaf v. Calaf*, 232 U. S. 371, 374. It is unnecessary to consider whether this second case again made the matter *res judicata*. It is enough to refer to it here as authority with regard to matters of local procedure, as to which innumerable cases have established the weight to be given to the local courts. *Tevis v. Ryan*, 233 U. S. 273, 291; *Nadal v. May*, 233 U. S. 447, 454.

It appears to us surprising to suggest that the highest court of the Hawaiian Islands did not decide in accordance with the requirements of the law of which that court was the final mouthpiece; and that courts of another jurisdiction, sitting long afterwards, know its duties and powers so much better as to be entitled to pronounce its proceedings void. The caution required in such a venture, even as against less authoritative decisions, has been stated and restated, from *United States v. Percheman*, 7 Pet. 51, 95, to *Michigan Trust Co. v. Ferry*, 228 U. S. 346, 354. And when it is added that the grounds for the supposed invalidity are matters mainly of form and local procedure and wholly of local control, it seems to us plain that the judgment must be reversed.

Judgment reversed.